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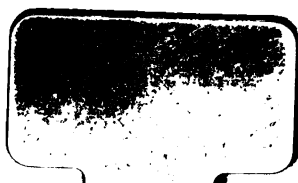
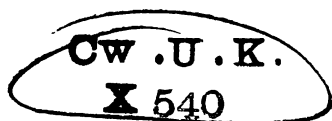
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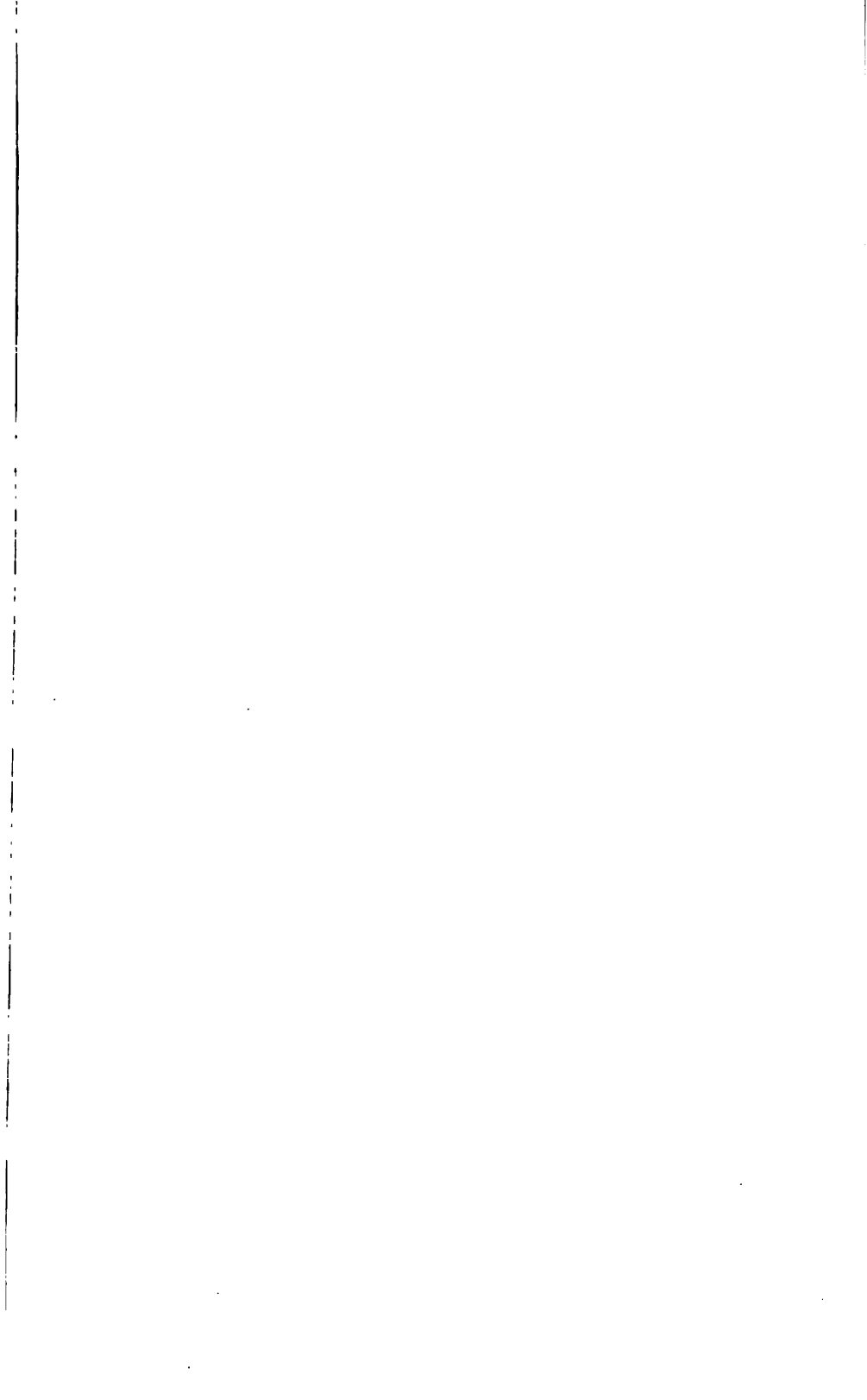
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(FIRST SERIES),

WITH NOTES

AND

COPIOUS QUESTIONS

ON THE

TEXT AND NOTES.

BY THE

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PREFACE.

THIS work forms the first of the proposed series of the "LAW STUDENTS' LIBRARY," and will be followed by Lord Coke's Commentary, or, as it is otherwise called, his "First Institute." The object of this "LIBRARY" is to furnish a *graduated series of works*, of which each shall be introductory to the other, and so serve to facilitate the progress of the student. The works also will be such as are of intrinsic authority, and may be confidently relied on by the student and the practitioner.

The present work will, it is believed, be found to form a good commencement, though, from the method adopted by Littleton in framing his sections by way of examples rather than by abstract propositions, it may not make so great an appearance of furnishing principles as some of the works which are to follow will do. This however, as the reader will soon discover, is only in appearance, as, in truth, the sections are very frequently supported by solid reasons.

The mode in which the work has been edited is, in the first place, by omitting the portions quite obsolete ; in the

next place, by slightly altering Littleton's text where some partial change has been made in the law since Littleton's time, not extending, however, beyond the insertion of the word "*formerly*," or some similar expression, and the alteration of verbs from the present to the past tense where necessary ; and, in the third place, by adding notes to very many of the sections, noticing the changes made by statutes, and, in some cases, stating recent decisions of importance ; and, in the last place, by furnishing a most complete series of questions on the text and notes. The utility of these questions will, it is believed, be generally acknowledged, as they have been made very copious, so as to apply to every proposition in the work. It is conceived that, by the aid of these questions, a student may more easily comprehend and retain in memory the chief propositions of the work.

The subsequent works will travel over a part of the same ground, embracing, however, more practical matters, which will afford an opportunity for additional explanations, the comprehension of which the careful study of the present work will much facilitate.

27TH MARCH, 1854.

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LITTLETON'S TENURES.

FIRST SERIES.

[NOTE.—The portions inserted in the sections between brackets [], and in *italic*, have been introduced in order to indicate alterations made since Littleton's time, or, occasionally, to make his meaning more evident.]

FEE SIMPLE.

SECT. I. *Fee simple defined.* The word "*heirs*" necessary in conveyances.—Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs for ever; and it is called in latin *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say lawful or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase, "*To have and to hold to him and to his heirs;*" for these words, "*his heirs,*" make the estate of inheritance. For if a man purchase lands by these words "*To have and to hold to him for ever;*" or by these words, "*To have and to hold to him and his assigns for ever;*" in these two cases he hath but an estate for term of life, for that there are wanting those words, "*his heirs;*" which words only make an estate of inheritance in all feoffments and grants.

NOTE.—Littleton adds the words "*for ever,*" but these are superfluous: the point is, that the estate is an inheritance not confined to any particular heirs. Where the word

"fee" alone is used, it is always understood of a fee simple (Sect. 293). In a *will* no such words are necessary in order to carry a fee (Sect. 586). If there be a devise to "A," he will take a fee or such other estate as the testator had power to dispose of; unless, indeed, a contrary intention appear by the will. (1 Vict. c. 26, s. 28.)

SECT. II. *Descent to collaterals*.—And if a man purchase land in fee simple and die without issue [*and leaving no father*, Sect. 3], he which is his next cousin collateral of the whole blood, how far soever he be from him in degree, may inherit and have the land as heir to him.

NOTE.—Littleton puts the case of a descent from a person being a "purchaser;" but in his time it was not necessary that a person should be a purchaser in order to be the root or stock of descent: it was sufficient that he should obtain an actual seisin (2 Black. Com. 209) of the lands. By such seisin, though he himself took by descent, he became the root or stock of descent, controlled, however, by the rule that whoever would make himself heir to the person last seised must also show himself to be heir to his real or supposed ancestor (2 Black. Com. 223). But now, by the 3 & 4 Will. 4, c. 106, s. 2, the seisin is not in any case required, and the descent is to be traced from the purchaser, who is always the person last entitled, if he did not derive his title by descent; if he became entitled by descent, then the most remote ancestor who shall be shown to have inherited the estate will be considered as the purchaser (unless there have been such a dealing with the estate as mentioned in the note to Sect. 12). Thus, if A inherited an estate from his father, who also inherited from his father, on A's death the descent will be traced not from A, but from his grandfather, unless it be shown that the latter also inherited it, and then the descent will have to be traced from the most remote ancestor who can be shown to have inherited the land. A party seised may, however, constitute himself a purchaser by limiting in a deed the fee to himself or to his heirs. (See Note to Sect. 12.)

SECT. III. *Inheritances did not formerly lineally ascend*.—But if there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple and die without issue living his father, the uncle [*formerly*] should have had the land as heir to the son, and not the father, and yet the father is nearer of blood, because it was [*formerly*] a maxim of law that inheritances might lineally

descend, but not lineally ascend. Yet if the son in the above case had died without issue, and his uncle had entered upon the land as heir to the son (as by law he [*formerly*] ought) [*in order to have made himself the stock or root of descent* (Sects. 2 note, and 8 (a) note)]; and after the uncle died without issue living the father, the father would have had the land as heir to the uncle and not as heir to his son, for that he could come to the land by collateral descent only, and not by lineal ascent.

NOTE.—By 3 & 4 Will. 4, c. 106, s. 6, a lineal ancestor may be heir to his descendants: where a son dies without issue, the father inherits; a grandfather is preferred to the son's uncles or aunts, &c. Thus s. 6 of the Act enacts that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir, in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor; so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

SECT. IV. *Paternal line of purchaser preferred to maternal. Descents ex parte paternâ et maternâ.*—And in case where the son purchaseth land in fee simple, and dies without issue [*and without leaving a father surviving*, s. 3], they of his blood on the father's side shall inherit as heirs to him, before any of the blood on the mother's side; but if he hath no heir on the part of his father, then the land shall descend to the heirs on the part of the mother; but if a man marrieth an inheritrix of lands in fee simple, who have issue a son, and die, and the son enter into the tenements as son and heir to his mother, and after dies without issue, the heirs of the part of the mother ought to inherit, and not the heirs on the part of the father [Sect. 123]; and if he hath no heir on the part of the mother, then the lord of whom the land is holden shall have the lands by escheat. In the same manner it is if lands descend to the son of the part of the father, and he entereth, and afterwards dies without issue, this land shall descend to the heirs on the part of the father, and not to the heirs on the part of the mother [Sect. 123]; and if there be no heir of the part of the father, the lord of whom the land is holden shall have the land by escheat. And so see the diversity where the son purchaseth lands or tenements in fee simple, and where he cometh to them

by descent on the part of his mother or on the part of his father.

NOTE.—The law is still the same, but in the case of the son inheriting from his mother, she, and not, as in Littleton's time, her son, would be the root or stock of descent; for by the 3 & 4 Will. 4, c. 106, s. 2, every descent is to be traced from the purchaser. As by sect. 3 of that Act a person who took by descent may be constituted a purchaser by the limitation to himself or to his heirs of a fee in an assurance by him of the lands (see Note to Sect. 12), a *maternal* inheritance may thereby be turned to a *paternal* one. So, as by sect. 4 of the Act, where heirs take by purchase under limitations to the heirs or to the heirs of the body of their ancestor (*i. e.*, where the ancestor takes no estate), the land is to descend as if the ancestor had been the purchaser; if now a remainder be limited to the heirs of a woman (though no estate be limited to her), her heirs will take: on the death of her issue, her collateral heirs, instead of becoming postponed, as formerly, to those *ex parte paternâ*, will take in exclusion of them. (See Watk. on Descents, c. 5, pp. 155, 156.)

SECT. V. *The elder brother is preferred to a younger.*—Also, if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue [*and without leaving a father, see ante, Sect. 3*], the elder brother shall have the land by descent, and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue [*and without leaving a father, Sect. 3*], the eldest brother shall have the land by descent, and not the middle, for that the eldest is most worthy of blood.

This refers to a descent at the common law, *i. e.*, to ordinary descents. In the case of copyholds descending by custom to a younger son, brother, &c., the younger brother takes by virtue of the custom (Sect. 165 and Note). In Littleton's time the descent between brothers was *immediate*; but by 3 & 4 Will. 4, c. 106, s. 5, it is to be traced through the parent.

SECT. VI. *Half blood formerly excluded from inheriting.*—Also, it is to be understood that [*formerly*] none could have land of fee simple by descent as heir to any man, unless he were his heir of the whole blood. For if a man had issue two sons by divers venters, and the elder purchased lands in fee simple, and died without issue, the younger brother should not have had the land, but the uncle of the elder brother, or some

other his next cousin, should have had the same, because the younger brother was but of half blood to the elder.

NOTE.—This applied to lands in fee simple, and not to those held in fee *tail*: there half blood was no impediment: the half brother took rather *per formam doni* than by descent (Sect. 52, note). By the 3 & 4 Will. 4, c. 106, s. 9, the half blood of the purchaser may inherit to him, though not so completely as if of the whole blood, for he is postponed: for where the father is the common ancestor, the half blood is not to take until after relations of the same degree of the same blood; and where the common ancestor is the mother, not till after such mother. Suppose two brothers of different *mothers*, on the death of one entitled to lands by purchase, the half-brother will not take till after his half-sisters and their issue. Suppose the two brothers were by different *fathers*, then the half-brother would be postponed not merely to his half-sisters, but to all the relations of his half-brother *ex parte paternâ*, and would take only after his own mother, who under both the old and new law never takes until failure of the paternal line. (See Sect. 4.)

SECT. VII. *The sister of the whole blood preferred to brother of half blood of purchaser.*—And if a man hath issue a son and a daughter by one venter, and a son by another venter, and the son of the first venter purchase lands in fee and die without issue [*his father not surviving him* (see Sect. 3)], the sister shall have the land by descent as heir to her brother, and not the younger brother, for that the sister is of the whole blood of her elder brother.

NOTE.—The old law was not merely a preference of the sister, but an entire *exclusion* of the half-blood. The half-blood is now merely *postponed*. (See Note to Sect. 6.)

SECT. VIII. (a) *Possessio fratris.*—A sister of one who, taking by descent from his father, had, by entry, &c., made himself the root of descent, was also preferred to the brother of the half blood.

NOTE.—Formerly the entry into the lands of a party entitled by descent, made him the root of descent: the maxim was, *seisina facit stipitem*. But now seisin is unimportant, and the *purchaser* is the root of descent (Sect. 2, note). In the above case put by Littleton, supposing the brother of the half blood not to have made himself a purchaser (See Note to sect. 12), on his death without issue, his half brother would be preferred to the sister, for the descent is

to be traced from the purchaser, and the half-brother would be heir to him.

SECT. VIII. (b) *Non-entry of half-brother.* Where the half-brother, entitled by descent, did not constitute himself the root of descent, the surviving brother of the half-blood was preferred to the sister of the whole blood.

NOTE. This is, of course, the case now: for the postponement of the half-blood is only where the descent is to be traced from a person who is of the half-blood to the claimant; but, in the above case, the descent would be traced from or beyond the parent, who is no half-blood to his children.

SECT. IX. *Inheritance.* The word "inheritance" is not confined to a fee acquired by descent, but is also applied to a fee (whether simple or tail) obtained by purchase, because the heirs may inherit the same.

NOTE.—Here Littleton says that an estate tail is an inheritance: and so it is; but, still it is but a *particular* estate, the proof which is, that a remainder may be limited after it (Burton's Comp. pl. 644). And Littleton says (Sects. 18, 19, 283), that the donor has a reversion, which is another proof that an estate tail, though an inheritance, is but a particular estate.

SECT. XII. *Purchase.*—An estate by purchase is where a person obtains lands by his own act or agreement, and not by descent from another [sect. 224].

NOTE.—A man who inherited from his mother could not, formerly, by conveying the estate, with an ultimate or entire limitation, to or to the use of himself or of his heirs, make such estate descend as if it were a paternal estate: notwithstanding such limitations, the conveying party would not be a purchaser; nor could he thereby constitute his heirs purchasers: there must have been a departing with the whole estate, and a re-taking of it by a *new* conveyance, to have made a purchase (Co. Litt. 12b, 13a, 22b; Burt. Comp. pl. 333, 335). But now, by 3 & 4 Will. 4, c. 106, s. 3, a conveyance, with a limitation or use to the grantor and his heirs, or to his heirs merely, will make the conveying party a purchaser, and will so enable the heirs *ex parte paternâ* to inherit in preference to those *ex parte maternâ* (see Sect. 4); and notice that the old doctrine of *seisina fecit stipitem* did not turn a descent *ex parte maternâ* to one *ex parte paternâ*; in other words, it was not equivalent to a purchase (2 Black. Com. 209, 222).

OF FEE TAIL.

SECT. XIII. *Fee tail is by statute West. 2 divided into general and special.* Tenant in fee tail is by force of the statute of West. 2, cap. 1; for before the said statute all inheritances (Sect. 9) were fee simple; for all the gifts which are specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsal of the same statute. And now by this statute, tenant in tail is in two manners, that is to say, tenant in tail general, and tenant in tail special.

NOTE.—To make a proper estate tail, the subject-matter must be land, or some other thing of a real nature, and the estate therein must be an inheritance. A *quasi* entail may be created in an estate *pur autre vie* (Co. Litt. 20 a, n. 5). Copyholds cannot be entailed except by custom (*post*, Sect. 73; 2 Prest. Abstr. 28; 2 Black. Com. 113). It must be remembered that though an estate tail is an inheritance, it is only a *particular* estate. (Note to Sect. 9.)

SECT. XIV. *Tenant in tail general defined.*—Tenant in tail general is where lands or tenements are given to a man, and to his heirs of his body begotten. In this case it is called general tail, because whatsoever woman that such tenant taketh to wife (if he hath many wives, and by every of them hath issue) yet every one of these issues by possibility may inherit the tenements by force of the gift; because every such issue is considered of his body.

NOTE.—It is very common in limitations of estates tail, to add “lawfully begotten,” or, “lawfully issuing;” but such expressions are unnecessary in order to create an estate tail even in a deed: it is enough if the word “heirs” be used, and the person from whom the issue is to proceed be ascertained, as “the heirs of the body of A, &c.” (Hayes’ Princ. Convey. 465, n. 8, 4th edit.)

SECT. XV. *To a woman and the heirs of her body.*—In the same manner it is, where lands or tenements are given to a woman, and to the heirs of her body; albeit that she hath divers husbands, yet the issue which she may have by every husband, may inherit as issue in tail by force of this gift; and, therefore, such gifts are called general tails.

SECT. XVI. *Tenant in tail special defined.*—Tenant in tail special is where lands or tenements are given to a man and to his wife, and to the heirs of their two bodies begotten [sect. 32]. In this case none shall inherit by force of this gift but those

that be engendered between them two. And it is called special tail [Sects. 29, 33, 53], because if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherit by force of this gift, nor shall the issue of a second husband, if the first husband die.

It will be seen that, in the above instance, both husband and wife take estates, but an estate may be in special tail, though one only of the parties named take an estate (see Sects. 29, 33, 53). As to gifts to two persons of the *same sex* and the heirs of their bodies, see Sects. 283, 284.

SECT. XVII. *Frankmarriage*.—This obsolete estate was one in special tail by the mere use of the word “*frankmarriage*.”

SECTS. XVIII and XIX. *Failure of issue*.—Where tenant in general tail, or special tail, dies without issue [*not having barred the entail*], the donor or his heirs may enter as in their reversion; “for in every gift in tail without more saying the reversion of the fee simple [*if not limited away*] is in the donor.”

The use of the word “*reversion*,” in the above section, and also in sect. 283, shows that an estate tail is, as before stated, but a particular estate. (Notes to Sects. 9, 13.)

SECT. XXI. (a) *Other estates tail*.—The beforementioned estates tail are specified in the statute of Westm. 2nd. In sects. 21—30 other estates tail, taken by the equity of the said statute, are enumerated.

SECT. XXI. (b) *Heirs male*.—On a gift to a man and to his heirs male of his body begotten, only issue male can inherit.

SECT. XXII. *Heirs female*.—On a gift to a man and his heirs female of his body begotten, only issue female can inherit.

See as to the necessity of the word “*body*,” or some other words of procreation, to create an estate tail, Sect. 31.

SECT. XXIII. *The heir on a gift to heirs males of the donee must trace his descent through males solely*.—And in case where lands or tenements be given to a man, and to the heirs male, of his body, and he hath issue two sons, and dieth, and the eldest son enters as heir male, and hath issue a daughter and dieth, his brother shall have the land, and not the daughter, for that the brother is heir male. But otherwise it is in the other entails which are specified in the said statute [of West. 2nd].

NOTE.—It must be borne in mind that the issue in tail

does not take by descent only, but also by the statute *de donis*, so as to be in *per formam doni*. (Litt. s. 22; Comyns' Dig. tit. "Estates" (B. 7); 2 Prest. Estates, 375, 381.)

SECT. XXIV. *The same doctrine further explained.*—Also, if lands be given to a man and the heirs male of his body, and he hath issue a daughter, who hath issue a son, and dieth, and after the donee die; in this case, the son of the daughter shall not inherit by force of the entail; because whosoever shall inherit by force of a gift in tail made to the heirs male, ought to convey his descent wholly by the heirs males. Also, in this case, the donor may enter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himself the descent by an heir male.

NOTE.—There never has been any doubt that the above doctrine of Littleton applied to a gift to one and his heirs male, or heirs female, of his body, under which those heirs take by *descent*; but in the case of a gift to such heirs *eo nomine* (i. e., without giving any estate to their ancestor), so as such issue took (prior to the 3 and 4 Will. 4, c. 106) as the first *purchasers* of the estate tail, it was considered by several text-writers of repute (see 2 Prest. on Estates, 407, 408; 2 Jarman, on Wills, 9) that it was sufficient if the person who answered the description of heirs was of that sex which the limitation described, although, being a female, she was descended from the ancestor named through a male, or being a male he was descended from such ancestor through a female. This rule, however, is not so stringent but that it will give way where the intention of a testator appears to be that the taker should deduce a title through males only; in such a case a male claiming through males entirely was preferred to one claiming through females, though the latter was the heir general; for though the general rule is that to take by purchase, under a devise to the male heirs of A, the taker must be both a male *and* very heir, yet such rule may be controlled where the rest of the devise shows that the deviser intends to give the preference to a male descendant of A, tracing his descent entirely through males, over a descendant who should be heir general of A, but not able to trace a descent entirely through males. (*Doe dem, Angell v. Angell*, 9 Qu. Ben. Rep. 328; S. C. 10 Jur. 709, and the various authorities there stated, especially Co. Litt. 24 b, n. 3, and 164 a, n. 2.) Under the 3 & 4 Will. 4, c. 106, s. 4, it should seem that Littleton's rule will apply to limitations under which the heirs of the body take as *purchasers*; for that statute directs

the land to descend as if the *ancestor* had been the purchaser of the lands. (See Note to Sect. 4.)

SECT. XXVI.—*Husband and wife. Heirs of husband.*—On a gift to a man and to his wife, and to the heirs of the body of the man, the husband has an estate in tail general, and the wife but a life estate.

SECT. XXVII. *Husband and wife. Heirs of husband.*—On a gift to husband and wife, and to the heirs of the husband which he shall beget on the body of his wife [Sect. 16], the husband hath an estate in special tail, and the wife but an estate for life.

SECT. XXVIII. (a) *Husband and wife. Heirs of wife.*—On a gift to husband and wife, and to the heirs of the body of the wife by the husband begotten, the wife has an estate in special tail, and the husband has but a life estate.

SECT. XXVIII. (b) *Husband and wife and their heirs.*—On a gift to husband and wife, and to the heirs which the husband shall beget on the body of the wife, both of them have an estate tail, because the word “heirs” is not limited to the one more than to the other.

NOTE. It is the reference, in Sects. 26, 27, of the word “heirs” to the body of the husband that causes him to take a descendible estate, as in Sect. 28 (a) the reference of that word to the body of the wife causes her to take a descendible estate.

SECT. XXIX. *Husband and his heirs.*—On a gift to a man and to his heirs which he shall beget on the body of his wife, the husband has an estate in special tail, and the wife takes no estate. [Sects. 33, 53.]

SECT. XXXI. *Gift to one and to his heirs male, or heirs female, is a fee simple.*—But if a man give [by deed] lands or tenements to another, to have and to hold to him and to his heirs male, or to his heirs female, he to whom such a gift is made hath a fee simple, because it is not limited by the gift of what body the issue male or female shall be, and so it cannot in any wise be taken by the equity of the said statute [of Westm. 2, chap. 1], and therefore he hath a fee simple.

NOTE.—Littleton is speaking of a deed of gift; for an estate tail may be created by a *devise* to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes

of expression, sufficient to indicate an intention to restrain the inheritance to the descendants of the devisee. (2 Black. Com. 115, 381; Burton's Comp. pl. 658.)

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

SECT. XXXII. *Tenant in tail after possibility of issue extinct, defined.*—Tenant in tail after possibility of issue extinct is, where tenements are given to a man and to his wife in special tail [Sect. 16], if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue the survivor shall not be said tenant in tail after possibility of issue extinct, yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue extinct.

SECT. XXXIII. *Gift to a man and to his heirs which he shall beget on the body of his wife.*—Also, if tenements be given to a man and to his heirs which he shall beget on the body of his [then] wife, in this case the wife has nothing in the tenements, and the husband is seised as donee in special tail [Sect. 29]. And in this case, if the wife die without issue of her body begotten by her husband, then the husband is tenant in tail after possibility of issue extinct.

NOTE.—In the previous section the husband and wife were both donees in special tail, and either might be tenant in tail after possibility, &c., but in the above section only the husband was tenant in special tail, and he only, therefore, could be tenant in tail after possibility, &c. (See Note to Sect. 16.)

SECT. XXXIV. *Who tenant in tail after possibility, &c.*—And note, that none can be tenant in tail after possibility of issue extinct, but one of the donees or donee in special tail [Sects. 14 & 29]. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because always during his life he may by possibility have issue which may inherit by force of the same entail. And so in the same manner the issue which is heir to the donees in special tail cannot be tenant in tail after possibility of issue extinct, for the reason above said.

NOTE.—“Lord Coke in Bowles’ case (11 Rep. 79) shews that there may be a tenancy in tail after possibility of issue extinct, as well of a remainder, as of an estate in possession.” (Per Lord St. Leonard’s in Creagh v. Blood, 3 Jon. & Lat. Ir. Rep. 164.)

OF THE CURTESY OF ENGLAND.

SECT. XXXV. *Tenancy by the curtesy explained.*—Tenant by the curtesy of England is, where a man taketh a wife seised in fee simple or in fee tail general [Sects. 14 & 15], or seised as heir in tail special [Sects. 16 & 52], and hath issue by the same wife male or female born alive [*inheritable as heir to the wife*, Sect. 52], albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesy of England, because [*in Littleton’s opinion*] this is used in no other realm but in England only [*which is, however, a mistake*, 1 Steph. Com. 246, note]. And some have said that he shall not be tenant by the curtesy, unless the child which he hath by his wife be heard to cry; for by the cry it is proved that the child was born alive. [*It is clearly sufficient that the child be born alive, though never heard to cry.* See Paine’s Case, 8 Coke’s Rep. 34; 2 Black. Com. 127.]

See further about Curtesy, *post*, Sects. 52 & 53. A husband is not entitled to curtesy of copyholds unless there be a special custom to warrant it (Co. Litt. 33 a, b). By the custom of gavelkind the husband has but a moiety for his curtesy, but he has that whether he had issue by his wife or not (4 Bacon’s Abr. tit. “Gavelkind,” A, p. 55, 7th edit.). He is entitled to curtesy of a trust or equity of redemption of freeholds, and also of copyholds, where there is a custom as to the legal estate. (Lewin, on Trusts, ch. 25, p. 519.)

OF DOWER.

SECT. XXXVI. *Estate in dower described.* *Of what estate widow dowable.*—Tenant in dower is, where a man is seised of [*or, now, is entitled to recover*] certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth; the wife, after the decease of her husband, shall be endowed of the third part [Sect. 37] of such lands and tenements as were her husband’s at any time during the coverture [*if their issue could inherit the same lands, as heir to the*

husband, Sect. 53], to have and to hold to the same wife in severalty, by metes and bounds [Sect. 44], for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband, for she must be above nine years old at the time of the decease of her husband, otherwise she shall not be endowed.

NOTE.—To entitle a husband to curtesy there must be issue of the marriage, but no such issue is required to entitle the wife to dower. Formerly a widow was dowable of a third part of such freehold lands as were her husband's at any time during the coverture, even though he should have disposed thereof, unless, indeed, his wife joined him in a recovery or fine (1 Roper's *Husb. and Wife*, 529; 1 *Hayes's Introd. Convey.* 293). But the 3 & 4 Will 4, c. 105, has made great alterations in the law of dower, the principal of which are the following: By sect. 4, no widow is entitled to dower out of any land which has been absolutely disposed of by her husband in his lifetime. By sect. 6, a widow is not entitled to dower out of any land of her husband when, in the deed by which such land was conveyed to him, or by any deed executed by him, it is declared that his widow shall not be entitled to dower thereout. By sect. 7, a widow is not entitled to dower out of any land of which her husband shall die intestate, when by his will he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land. By sect. 9, where a husband devises any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow is not entitled to dower out of or in any land of her said husband, unless a contrary intention is declared by his will. But by sect. 10, no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, will defeat or prejudice her right to dower, unless a contrary intention is declared by his will. The preceding enactments greatly abridge the wife's right to dower, but ss. 2 & 3 of the same Act enlarge her rights by giving her dower out of equitable estates, and mere rights of entry and action. By sect. 2, when a husband dies beneficially entitled to any land for an interest which would not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy [sect. 45]), his widow is

entitled *in equity* to dower out of the same land. By sect. 3, when a husband has been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she is entitled to dower thereout, although her husband has not recovered possession thereof. The old rule that after a title of dower had once attached, no act of the husband alone, whether voluntary, as by alienation or charge, or involuntary, as by bankruptcy, could defeat the widow's right, is completely subverted, for by sect. 10 of the Act all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land is subject or liable, are valid and effectual as against the right of his widow to dower. It must be borne in mind that the above statute does not extend to the dower of any widow married on or before the 1st of January, 1834, and not even though the lands are acquired subsequently to the passing of the Act.

SECT. XXXVII. *Dower by custom of moiety or whole.*—And note, that by the common law the wife shall have for her dower but the third part of the tenements which were her husband's during the espousals; but by the custom of some county she shall have the half, and by the custom in some some town or borough she shall have the whole [Sect. 166]; and in all these cases she shall be called tenant in dower.

NOTE.—The customs here referred to are incident to copyhold lands, and the right of the wife is usually in order to distinguish it from her right by the common law, termed *freebench*. This freebench is, in many manors, held during widowhood, or even chaste widowhood only; and it is generally, though not universally, confined to lands of which the husband died seised; whence it is, like dower by the 3 & 4 Will. 4, c. 105, no obstacle to alienation. (Burton's Comp. pl. 1311; 6 Jurist, 235; 1 Qu. Ben. Rep. 682.)

SECT. XLIII. *Where the wife may enter without assignment of dower, and where not.*—And note, that in all cases where the certainty appeared what lands or tenements the wife should have had for her dower, there the wife might enter after the death of her husband without assignment of any. But where the certainty appears not, as to be endowed of the third part, to have in severalty, or the moiety according to the custom, to hold in severalty [Sect. 36], in such cases it behoveth that her dower be assigned unto her after the death of her husband;

because it doth not appear before assignment what part of the lands or tenements she shall have for her dower.

NOTE.—The cases in which the certainty of the dower appeared were the now abolished (3 & 4 Will 4, c. 105, s. 13) dowers *ad ostium ecclesie* and *ex assensu patris*. The part relating to the certainty not appearing applies to the ordinary dower and freebench. Before assignment of dower the widow has but a *title*; after assignment she has an *estate*: which should be borne in mind.

SECT. XLIV. *Dower of tenancy in common not assigned by metes and bounds.*—But if there be two joint tenants [Sect. 45] of certain land in fee, and the one alieneth that which belongeth to him, to another in fee [Sect. 292], who taketh a wife and after dieth; in this case, the wife for her dower shall have the third part of the moiety which her husband purchased, to hold in common (as her part amounteth) with the heir of her husband, and with the other joint tenant [*who has become a tenant in common*, Sect. 292] which did not alien: for that in this case her dower cannot be assigned by metes and bounds.

NOTE.—The reason for the above is, that the husband was seised at his death of a moiety as tenant in common, for the alienation of one of two joint tenants turns the estate into a tenancy in common. (Sect. 292; 1 Steph. Com. 317.)

SECT. XLV. *No dower of an estate in joint tenancy.*—And it is to be understood that the wife shall not be endowed of lands or tenements which her husband holdeth jointly with another at the time of his death, but where he holdeth in common; otherwise it is as in the case next aforesaid. [Sect. 44.]

SECT. LII. *Of what estate there shall be curtesy.*—And memorandum, that in every case where a man taketh a wife seised of such an estate of tenements, &c., as the issue which he hath by his wife may by possibility inherit the same tenements of such an estate as the wife hath as heir to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesy of England, but otherwise not. (Sect. 35.)

NOTE.—It will be seen that Littleton speaks of the necessity of the issue of the marriage being such as may by possibility inherit the estate “as heir to the wife.” This taken literally would deprive the husband of curtesy out of an estate tail; for in such an estate the heir takes from the donee in tail *per formam doni* (Com. Dig. tit. “Estates,” B. 7); but it is clear (Sect. 35) that the husband is entitled

to curtesy out of such an estate. In fact, as Mr. Butler states (Co. Litt. 241 a, n. 4), the words only refer to the necessity of the wife being seised of an estate, the *quality* of which was such that the issue of the husband might inherit it. The real point seems to be this: suppose the estate to have been given to the wife, was it such as her heirs could inherit? If yes, then the husband was entitled to curtesy; if no, then there was no curtesy. However, some persons have chosen to take Littleton's words literally, and to assert that the late Inheritance Act has made a most important alteration in respect to descended estates (see 10 Jur., pt. 2, p. 132); for, as before stated, descents are now no longer to be traced from the person last seised, but from the purchaser (Sect. 2, note). Now where the wife inherits an estate there cannot (according to these persons) be any curtesy; for the issue will not inherit "as heir to the wife." The same reasoning applies to dower; for, as will be seen by the next section, the same words are there used as to the necessity of the issue being heir to the husband, in order to entitle the wife to dower. In our view of the matter the parties above referred to are quite wrong in making such an application of the words of Littleton; and there can, we think, be no doubt that the husband would be entitled to curtesy though his wife inherited the estate; and, of course, the surviving wife is entitled to dower out of her husband's estate, though he inherited the same.

SECT. LIII. *No dower if issue could not by possibility inherit as heir to the husband.*—And also, in every case where a woman taketh a husband seised of such an estate in tenements, &c., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband [Note to Sect. 52], of such tenements she shall have her dower, and otherwise not. For if tenements be given to a man, and to the heirs which he shall beget of the body of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special tail [Sect. 29]. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dieth, living her husband, and after the husband takes another wife and dieth, his second wife shall not be endowed in this case for the reason aforesaid.

NOTE.—The case of *Barker v. Barker* (2 Simons, 249),

following *Sumner v. Partridge* (2 Atk. 47), has decided that on a devise to a woman and her heirs, but if she died leaving issue, then to her children and their heirs (which gave the children an estate as purchasers), the husband is not entitled to curtesy, "for the wife had not such an estate as could descend to her children (within Littleton's language), inasmuch as they take by purchase." The marginal note of this case is erroneous, and the mistake has been carried into the text books: substitute "her children" for "such issue."

TENANT FOR TERM OF LIFE.

SECT. LVI. *The estate of tenant for life defined.*—Tenant for term of life is, where a man letteth lands or tenements to another for term of the life of the lessee, or for term of the life of another man. In this case, the lessee is tenant for term of life. But by common speech, he which holdeth for term of his own life is called tenant for term of his life; and he which holdeth for term of another's life is called tenant for term of another man's life.

It must be borne in mind that a demise to another for a *time indeterminate* passes (in general) an estate for the life of the lessee (Comyns' Dig. tit. "Estates" (E. 1); Co. Litt. 42 a; 20 Law Tim. 111; 2 Jurist, 459; 5 *Id.* 459; 2 Black. Com. 121). Thus, "if I make a lease to another till I go to Westminster, the lessee has an estate for [his own] life. So if A leases to B till A make J S bailiff of his manor, B has the freehold in him; for since there is no particular time specified, but it is left indefinitely when I shall go to Westminster, or J S shall be made bailiff of the manor, and these contingencies may or may not happen during the life of the lessee, and the livery [or now the grant] transfers the freehold to him; so he must consequently, by the words of the gift, enjoy it during his life, if none of these contingencies happen in that time, upon which his estate is to determine" (1 Rolle's Abr. 844. See also Bacon's Abr. "Estate for Life" (A.); Note 243 to Co. Litt. 42; *Hewlins v. Shippam*, 5 Barn. and Cres. 229). We have added the words "or now the grant," as it was held with respect to things lying in grant, that the delivery of the deed was equivalent to livery on the feoffment; so that as now by the 8 & 9 Vict. c. 106, the immediate freehold of lands will pass by a grant (Note to Sect. 59), there can be little doubt that a life estate will, in the above instances, pass by a grant.

TENANT FOR TERM OF YEARS.

SECT. LVIII. *Tenancy for years defined.*—*Debt or distress may be had for arrears of rent.*—*Nil habuit in tenementis.*—Tenant for term of years is, where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee entereth [Sect. 459] by force of the lease, then is he tenant for term of years; and if the lessor in such case reserve to him a yearly rent upon such lease, he may choose to distrain [Sect. 213, *et seq.*] for the rent in the tenements let, or else he may have an action of debt for the arrearages against the lessee. But in such case it behoveth that the lessor be seised in the same tenements at the time of his lease; for [formerly] it was a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease; except the lease be made by deed indented [note to Sect. 370], in which case such plea lieth not for the lessee to plead.

On the demise of a term, no estate is vested in the lessee, but he has a mere right of entry, and his interest till he enters is termed an *interesse termini* (Sect. 66; Watkins Convey. 33, and Note by Morley and Coote; Saffyn's Case, 5 Coke's Rep. 124; Doe v. Walker, 5 Barn. and Cres. 111; 4 Jarman's Convey. by Sweet, 311; Neale v. Mackenzie, 1 Mees. and Wels. 747). It must be borne in mind, however, that this is intended of common law leases, and does not apply to terms created by a bargain and sale for a year, or for years, by a person seised of the freehold, or to terms created by way of limitation of use in any conveyance to, or declaration of uses, whether such terms are intended to take immediate effect or to give a future interest; in such cases the terms become actual estates *without* entry (Watk. Convey. 35; Doe v. Brown, 17 Jurist, 1061; 2 Barton's Elem. Convey. 425, 426). It would require too much space to enter into a discussion as to the effect of the provision in the 8 & 9 Vict. c. 106, s. 2 (Note to Sect. 59), making corporeal tenements to lie in grant, on the doctrine of *interesse termini*: there has not been any decision, nor have we seen the point mooted, but there seems to be good ground to conclude that a case containing the word "grant" would pass an estate without entry being required, except for the purpose of maintaining trespass. The old doctrine that a lease was a mere contract was founded on the notion of the freeholder being the only recognised tenant of the land, and a feoffment the only mode of transferring the possession, *i. e.*, the freehold.

The doctrine of Littleton, that it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of granting a lease, not by deed indented, is not now law, for a tenant who has been let into possession of lands by another, or has acknowledged, with full means of knowledge, the latter's title, as, for example, by payment of rent, will not be permitted to impeach his landlord's title. (Syllivan v. Stradling, 1 Wilson, 208; Cooke v. Loxley, 5 Term Rep. 4; Dolby v. Ives, 4 Jurist, 432; Roscoe's Evid. 194, 471, 5th edit.) But a tenant may show that the landlord's title has expired, if he have renounced his title and commenced a fresh holding under another person, and in an action for *rent* he may show such expired title though he continues to occupy the premises and has not been evicted (Gravenor v. Woodhouse, 1 Bing. 38, 43; Doe v. Edwards, 5 Barn. and Adol. 1065; Doe v. Brown, 7 Adol. and Ellis, 447; Roscoe's Evid. 199, 472, 5th edit.; Mountnoy v. Collier, 17 Jur. 503.) As Littleton speaks of indentures, we may here observe that by sect. 5 of 8 & 9 Vict. c. 106, a deed executed after the 1st of October, 1845, purporting to be an indenture, has the effect of an indenture, although not actually indented.

SECT. LIX. *Lease for years, or even for life, does not require livery.*—And it is to be understood that in a lease for years by deed, or [*formerly*] without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will [Sect. 66], by force of the same lease. But of feoffments made in the country, or [*formerly*] gifts in tail, or lease for term of life, in such cases where a freehold shall pass, if it be by deed, or [*formerly*] without deed, it behoveth to have livery of seisin.

NOTE.—Littleton speaks of a lease without deed, and so, till lately (except, indeed, of incorporeal things, including reversions and remainders, which must always have been by deed, 4 Jarman's Convey. by Sweet, 254, 309; Burt. Comp. pl. 59; Bird v. Higginson, 5 Adol. and Ellis, 824; Rex v. Marq. Salisbury, 8 Adol. and Ellis, 716), a deed was not requisite. Formerly a lease by word of mouth for any term of years was good (4 Jarman's Convey. by Sweet, 309), and livery was not requisite (1 Steph. Com. 475); but by the statute of frauds (29 Chas. 2, c. 3, ss. 1, 2), all leases, except those not exceeding three years from the *making* thereof, with a rent of not less than two-thirds of the improved value, must have been put into writing, and have been signed by the lessor or his agent lawfully authorised by writing. But by sect. 4 of 8 & 9 Vict. c. 106, "a lease, required by law

to be in writing, of any tenements or hereditaments, made after the 1st of October, 1845, shall be void at law unless made by *deed*." So that now a lease must, except such a parol lease as is good under the statute of frauds, be by *deed*. As Littleton speaks of a feoffment, it may be observed that it is the most ancient method of conveyance of an estate of freehold in *possession* in a *corporeal* hereditament. The feoffment has in modern times almost fallen into desuetude, and will become less usual now, as it is enacted by sect. 2 of the 8 & 9 Vict. c. 106, "that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." So that now no deed, though passing a freehold (except a feoffment), requires livery. Consequently a lease for life does not now require livery; and even a feoffment, so far as concerns its operation as a grant, would pass a fee without livery. The operative words of a feoffment are always "*given, granted, and enfeoffed*." In the above section (and see Sects. 215, 216) Littleton speaks of a feoffment *without deed*, but by sect. 3 of 8 & 9 Vict. c. 106, it is enacted "that a feoffment, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced by *deed*." In early times livery alone was necessary to pass an estate in lands, and no deed or writing was necessary, though it afterwards became usual to evidence the livery by deed. And by the statute of frauds (29 Chas. 2, c. 3, s. 1), no estate created by livery of seisin only, and not put in writing signed by the party or his agent, shall be of any force except to constitute an estate at will. A writing thus became necessary, and now, as we have seen, a *deed* is requisite. (See hereon 2 Black. Com. 310—316; 1 Steph. Com. 467—474; 4 Jurist, 1075; Notes to Co. Litt. 42 a.) Whilst speaking of the statute of 8 & 9 Vict. c. 106, in relation to feoffments, it may be observed that by s. 4 "a feoffment made after the 1st of October, 1845, shall not have any tortious operation."

Grant and feoffment.—From what has been above stated, and will also appear from other portions of Littleton (see especially Sects. 66 and 70), it will be desirable to show that there are cases in which a deed purporting to be a feoffment might, if completed by livery, be effectual when, as a mere grant, it would be inoperative. It must be understood (see Sects. 66 and 70) that by a feoffment alone nothing passes, except an estate at will; and that it is, in effect, the livery which passes the fee. (2 Black. Com. 313; Hay. Introd. Convey. 21, 4th edit.) It is a rule that a freehold cannot,

by any conveyance operating at the common law (and a grant (2 Black. Com. 317) is such a conveyance as much as a deed of feoffment), be created to commence *in futuro*. (1 Prest. Estates, 216; Hay. Princ. Convey. 15, 4th edit.) Nothing in the late Acts has affected this rule; and, indeed, the 8 & 9 Vict. c. 106, s. 2, in giving effect to a grant of corporeal hereditaments, does so only so far as regards the conveyance of the *immediate* freehold thereof. Therefore, a grant to A of lands to hold from Christmas next would not pass any estate, but a feoffment to A to hold from the same time with livery *after that time*, would be good and effectual, for the estate has effect by the livery and not by the feoffment; and, therefore, it is *not* an estate created *in futuro*, and yet it is "evidenced" by a deed, as required by s. 2 of the 8 & 9 Vict. c. 106 (*suprà*). For till livery on a feoffment strictly so taken (*i. e.* excluding its character of grant under the late Act), nothing passes from the feoffor: the freehold continues in him till the intended conveyance begins to operate, which, in the case of such a feoffment, is the delivery of seisin. (See *Freeman v. West*, 2 Wils. 165; 1 Preston on Estates, 224, 2nd edit.) This is confirmed in another instance (which will serve further to illustrate the distinction referred to) by C. B. Comyns, in his Digest (tit. "Feoffment," B. 8), where he says, "that if a feoffment be by an infant to commence at a future day, before which the feoffor comes of full age, and *after* the day he makes livery, it shall be good."

SECT. LXII. *A man may have a fee simple, &c., without livery on an exchange.*—And in some cases a man should [*even formerly*] have [*had*], by the grant of another, a fee simple, fee tail, or freehold, without livery of seisin. As if there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other in exchange for the land which the other hath, and in like manner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each [*might even formerly and of course they now*] may enter into the other's land, so put in exchange, without any livery of seisin; and such exchange, made by parol, of tenements within the same county, without writing was [*formerly*] good enough.

NOTE.—Formerly, under the statute of frauds (29 Chas. 2, c. 3, ss. 1, 3), an exchange must, if it related to land for a larger interest than a term of three years, have been in writing; and now by section 3 of 8 & 9 Vict. c. 106, "an exchange of any tenements or hereditaments, not being copyholds, shall be void unless made by deed." Remember that,

as to things lying in grant, a deed was always necessary. (Sect. 59, note; Co. Litt. 51 b.)

Littleton speaks of the parties to the exchange entering into the lands exchanged, and we may notice that this should formerly have been before either party's death, or else the heir of the party dying might have avoided the exchange. (Co. Litt. 50 b; *Turner v. Edgell*, 1 Keen, 502; 4 Jarman's Convey. by Sweet, 2; 2 Black. Com. 323.) We say "formerly," because it should seem that the 8 & 9 Vict. c. 106, by making the immediate freehold of lands to lie in grant (Note to Sect. 59), has done away with the necessity for an entry in the lifetime of the party. We should have thought this was evident, but we observe that the late text writers have not altered their text accordingly. At any rate, if the exchange (as has long been the practice) be by lease and release, or other conveyance operating under the statute of uses (1 Steph. Com. c. 18), as the statute executes the use into possession, no entry is necessary (Co. Litt. 271 b, n. (1), s. 3; 4 Barton's Elem. Convey. 198, note (2); 4 Jarman's Convey. by Sweet, 6). In order to give an instrument the operation of an exchange, so as to induce the consequences stated by Littleton, the word "exchange" must have been used (Co. Litt. 51 a, [e, f] and note 330; 2 Black. Com. 323). If that word was omitted, the term *mutual conveyances* was applied to the transaction, and then none of the consequences of an exchange followed (*Eton College v. Bish. of Winchester*, 3 Wils. 491; *Bartrum v. Whichcote*, 6 Simons, 86; *Croome v. Lediard*, 2 Myl. & Ke. 251; 4 Jarman's Convey. by Sweet, 2, 5). The effect of the word "*exchange*" formerly was an implied warranty and a condition which gave a re-entry to either party (but not to his alienee) upon all the land given in exchange, upon his being put out of all or part of the land taken in exchange (1 Steph. Com. 452, 478; 2 Barton's Elem. Convey. 191, 192; *Bustard's Case*, 4 Coke's Rep. 121; 4 Jarman's Convey. by Sweet, 2, 3). But now, by s. 4 of 8 & 9 Vict. c. 106, "an exchange shall not imply any condition in law."

SECT. LXIV. *In exchanges the estates must be equal.*—And note, that in exchanges it behoveth that the estates which both parties have in the lands so exchanged be equal; for if the one willeth and grant that the other shall have his land in fee tail for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is void, because the estates be not equal.

SECT. LXV. *The lands need not be of equal value.*—In the same manner it is, where it is granted and agreed between them, that the one shall have in the one land fee tail, and the other in the other land but for term of life; or if the one shall have in the one land fee tail general [Sect. 14], and the other in the other land fee tail special, &c. [Sect. 32.] So always it behoveth that in exchange the estates of both parties be equal, viz., if the one hath a fee simple in the one land, that the other shall have like estate in the other land; and if the one hath fee tail in the one land, the other ought to have the like estate in the other land, &c., and so of other estates. But it is not necessary to exchange of the equal value of the lands; for albeit that the land of the one be of a far greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equal. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c., and in each of their grants mention should [*formerly*] have been made of the exchange.

NOTE.—There will now no longer be any utility in mentioning in the grant that it was by way of exchange, and it was usual to avoid it in the mutual Conveyances referred to in the note to Sect. 62.

SECT. LXVI. *Lessee for years may enter after lessor's death, but feoffee, even if livery is to be by attorney, cannot enter after feoffor's death.*—Also, if a man letteth land to another for term of years, albeit the lessor dieth before the lessee entereth into the tenements [Note to Sect. 58], yet he may enter into the same tenements after the death of the lessor [*so that it be during the term*], because the lessee by force of the lease hath right presently to have the tenements according to the form of the lease [Sect. 68]. But if a man maketh a deed of feoffment [*in fee*] to another, and a letter of attorney to one to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought [Sects. 59, 70] to have the tenements according to the purport of the said deed, before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed the right of these tenements [*except so far as the deed has operation as a grant*, Note to Sect. 59] is forthwith in his heir, or in some other.

NOTE.—The reason of this latter part was that by the feoffment nothing but an estate at will formerly (Sect. 70) passed, and the death of the feoffor (lessor) determines that estate (Burton's Comp. pl. 19; Co. Litt. 57 b). The appointment of an attorney to give or receive livery in deed must

be by *deed* (Co. Litt. 48 b. (2) and note (313), 52 a; 2 Barton's Elem. Convey. 155). The death of the party giving the letter of attorney is a revocation and determination thereof (1 Bacon's Abr. tit. "Authority," E). A court of equity would decree that the assurance should be perfected (Sel. Cas. in Chanc. 81; Bakenham v. Bakenham, 1 Chanc. Cas. 240; Burgh v. Burgh, Rep. t. Finch, 28; 1 Fonbl. Eq. 27). And, indeed, as before stated (Note to Sect. 59), so far as the deed would, as a grant, be operative, livery is not now required. And it is to be remembered that where livery is required, even courts of law will, in favour of possession, presume livery, but this is never done where the transaction is not above twenty years ago (Watk. Convey. by Merrifield, 414; 2 Mees. & Wels. 507; Doe v. Cleveland, 9 Barn. & Cres. 864; Doe v. Wainwright, 5 Adol. & Ellis, 520; Burt. Comp. pl. 420, note).

TENANT AT WILL.

SECT. LXVIII. *Tenancy at will described. Lessee entitled to emblements.*—Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor [Sect. 82], by force of which lease the lessee is in possession [Sect. 66]. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet, if the lessee soweth the land, and the lessor, after it is sown, and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is, if tenant for years, which knoweth the end of his term, doth sow the land, and his term endeth before the corn is ripe. In this case the lessor, or he in the reversion, shall have the corn, because the lessee knew the certainty of his term, and when it would end.

NOTE.—The courts have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be estates at will; but have held them to be tenancies from year to year (especially where an annual, or even a quarterly, rent is reserved; Braythwaite v. Hitchcock, 10 Mees. and W. 494), determinable by either party on a six months' notice to quit, ending with the current year of the tenancy (Richardson v. Langridge, 4 Taunt. 128; Wilkinson

v. Hall, 3 Bing. N. C. 508; 4 You. and Coll. 394; Doe v. Wood, 9 Jurist, 1060; 1 Steph. Com. 271—273).

SECT. LXIX. *Tenant at will may enter to take away his goods after tenancy determined.*—So may executors of tenant for life, &c.—Also, if a house be let to one to hold at will, by force whereof the lessee entereth into the house and brings his household stuff into the same, and after the lessor puts him out, yet he shall have free entry, egress and regress into the said house by reasonable time to take away his goods and utensils. So if a man seised of a house in fee simple, fee tail, or for life, hath certain goods within the said house, and makes his executors and dieth, whosoever after his decease hath the house, his executors shall have free entry, egress and regress to carry out of the same house the goods of their testator by reasonable time.

SECT. LXX. *A feoffment without livery created an estate at will.*—Also, if a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not livery of seisin, in this case he to whom the deed is made may enter into the land, but [formerly] could only hold and occupy it at the will of him which made the deed; because [though] it was proved by the words of the deed that it was his will that the other should have the land [yet, there being no livery, there could be no freehold, Sects. 59, 66]; but he which made the deed might [formerly] have put him out when it pleased him.

NOTE.—We have had no hesitation in altering Littleton's text, on the grounds stated in the Note to Sect. 59; for as the deed is stated to have been delivered to the feoffee (assuming it not to be without the ordinary word "grant"), it would certainly operate as a grant of the immediate freehold of the lands, which, as we have seen (Note to Sect. 59), now lies in grant as well as in livery.

SECT. LXXI. *Tenant at will not bound to repair. Action may be brought against him for voluntary waste.*—Also, if a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for term of years is tied; but if tenant at will commit voluntary waste, as in pulling down of houses or in felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee. So if I lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth my cattle, I may well have an action of trespass against him, notwithstanding the lending.

NOTE.—It is now fully established that no action will lie

against a tenant at will for *permissive* waste, but that it certainly will for *voluntary* waste (*Harnett v. Maitland*, 16 Mees. and Wels. 257; see 5 Jur. 550). An action on the *case* is the more usual remedy for waste. A bailee destroying the goods may, as Littleton says, be sued in trespass; but for an injury not amounting to destruction *case* would be the proper remedy. (Bacon's Abr. tit. "Trespass," p. 645, 7th edit.)

SECT. LXXII. *On lease at will, lessor may distrain or have action for arrears of rent.*—Note, if the lessor upon a lease at will reserve to him a yearly rent, he may distrain for the rent behind or have for this an action of debt, at his own election.

NOTE.—It is said in the case of *Pope v. Garland* (4 You. & Coll. 394) that a tenant at will at a yearly rent is a tenant from year to year; and in the Year Book, 48 Edw. 3, M. 8, p. 25, it is certainly said that "tenant at will has no interest in the land demised, nor can any *rent* be reserved on such a tenancy;" but this is in express contradiction to Littleton's assertion, and is, besides, opposed to modern decisions. (See *Doe v. Cox*, 11 Jur. 991; S. C. 17 Law Journ. N. S. Q. B. 3.)

OF TENANT BY COPY OF COURT ROLL.

SECT. LXXIII. *Tenancy by copy of court roll defined.*—Tenant by copy of court roll is, as if a man be seised of a manor, within which manor there is a custom which hath been used time out of mind of man, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee simple, or fee tail, or for term of life, &c., at the will of the lord, according to the custom of the same manor.

NOTE.—The tenant by copy of court roll is the same as is ordinarily denominated a *copyholder*. Littleton in the above section speaks of a copyhold being entailed, as to which some have thought that it could not be. (*Cro. Eliz.* 308, 907; *Cro. Car.* 43, 131, 411; *Gilbert's Tenures*, 164, *et seq.*) It is now fully settled that copyholds cannot at law be entailed *except by custom*, and that, therefore, in the absence of such a custom, a limitation of a copyhold to a man and "the heirs of his body" will create, not an estate tail, but a fee simple conditional at common law. (*Doe v. Clark*, 5 Barn. & Ald. 458; 2 Watk. Copy. 491, 4th edit.; *Burton's Comp.* 475; *Comyns' Dig.* tit. Copyhold, C. 8.)

It is to be observed that the words, "*at the will of the lord*," are material in the definition of a copyhold; for if, in pleading or speaking of this estate, those words be omitted, it will be intended to be a customary freehold (Co. Litt. 58 a, n. (1), and see Cro. Car. 219), a species of tenure which, though it in some respects resembles freeholds, is in truth nothing more than a superior kind of copyholds, held like them by copy of court roll, but not at the will of the lord; whence, for distinction's sake, they have been generally denominated customary freeholds. (See Thompson v. Harding, 9 Jur. 927; Perryman's Case, 5 Coke's Rep. 84; 2 Black. Com. 149; Bingham v. Woodgate, 1 Russ. & Myl. 32; 2 Scriven on Copyh. 679, 3rd edit.)

SECT. LXXIV. *Copyholder must not alien by deed, but by surrender to the lord.*—And such a tenant may not alien his land by deed, for then the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custom to surrender the tenements in court, &c., into the hands of the lord, to the use of him that shall have the estate, in this form, or to this effect:—

A. of B. cometh into this court, and surrendereth in the same court a mease, &c., into the hands of the lord, to the use of C. of D. and his heirs, or the heirs issuing [Note to Sect. 14] of his body, or for term of life, &c. And upon that cometh the aforesaid C. of D. and taketh of the lord in the same court the aforesaid mease, &c. To have and to hold to him and to his heirs, or to him and to his heirs issuing of his body, or to him for term of life, at the lord's will, after the custom of the manor, to do and yield therefore the rents, services and customs, thereof before due and accustomed, &c., and giveth the lord for a fine, &c., and maketh unto the lord his fealty, &c.

NOTE.—So strict is the rule that a copyholder cannot alien by deed *inter partes*, that it has been held that, on an assignment of copyhold premises by a common law conveyance of lease and release, without surrender to the lord of the manor, an ejectment cannot be maintained by the lessee even against the widow of the lessor; for the release passed no legal estate, but an *equitable* interest only; for the reader will bear in mind that Littleton's rule applies to the legal title only. *Equitable* interests in copyholds may pass by deed, or by will, and even prior to 7 Will. 4 & 1 Vict. c. 26, no surrender to the use of the will was necessary. (2 Prest. Abst. 37; 3 *Id.* 176; Burton's Comp. pl. 1395, 1396.) Though formerly a surrender to the use of a will was necessary (Co. Litt. 111 b, n. (3); Com. Dig. tit. Copyhold (F. 9);

2 Prest. Abst. 31; 3 *Id.* 176), to pass the *legal* estate by devise, yet by the 55 Geo. 3, c. 192, and by s. 3 of 7 Will. 4 & 1 Vict. c. 26, it is dispensed with. Though a surrender be necessary to bar a *legal* estate tail in copyholds, yet an *equitable* estate tail may be barred by either surrender or deed. (3 & 4 Will. 4, c. 74, ss. 50, 53; 2 Steph. Com. 59.)

SECT. LXXV. *Why called tenants by copy of court roll.*—And these tenants are called tenants by copy of court roll, because they have no other evidence concerning their tenements but only the copies of court rolls.

NOTE.—The proper evidences of title to copyholds are copies of the court rolls. (*Doe v. Calloway*, 6 Barn. & Cres. 484.)

TENANT BY THE VERGE.

SECT. LXXVIII. *Tenancy by the verge explained.*—Tenants by the verge are in the same nature as tenants by copy of court roll. But the reason why they be called tenants by the verge is, for that when they will surrender their tenements into the hands of their lord to the use of another, they shall have a little rod (by the custom) in their hand, the which they shall deliver to the steward or to the bailiff, according to the custom of the manor, and he which shall have the land shall take up the same land in court, and his taking shall be entered upon the roll, and the steward or bailiff according to the custom shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge; but they have no other evidence but by copy of court roll.

NOTE.—Tenants by the verge are the same as copyholders, but are called tenants by the *verge*, because their investiture is by custom by means of a rod, wand or verge. (1 Scriven's Copyh. 341, 2nd edit.; Co. Litt. 61 a; 3 Barton's Elem. Convey. 3, note.)

SECT. LXXX. *Customs in manors are of various kinds, but they must not be against reason.*—And so it is to be understood, that in divers lordships and in divers manors there be many and divers customs in such cases, as to take tenements, and as to plead, and as to other things and customs to be done; and whatsoever is not against reason may well be admitted and allowed. [See Sect. 212.]

SECT. LXXXI. *Copyholders of inheritance have no freehold.*—And these tenants which hold according to the custom of a lordship or manor, albeit they have an estate of inheritance according to the custom of the lordship or manor, yet because they have no freehold by the course of the common law, they are called tenants by base tenure.

The freehold is in the lord (Com. Dig. "Copyhold" A. 2; 3 Scott, N. R. 554); and, in general, this is so in the case of customary freeholds (per Coltman J. in *Thompson v. Hardinge*, 9 Jurist, 929).

SECT. LXXXII. *The difference between the estate of copyholder and tenant at will of freeholds.*—And there are divers diversities between tenant at will, which is in by lease of his lessor by the course of the common law [Sect. 78], and tenant according to the custom of the manor in form aforesaid. For tenant at will according to the custom may have an estate of inheritance (as is aforesaid [Sect. 81]) at the will of the lord, according to the custom and usage of the manor. But if a man hath lands or tenements, which be not within such a manor or lordship where such a custom hath been used in form aforesaid, and will let such lands or tenements to another, to have and to hold to him and to his heirs at the will of the lessor [Sect. 68], these words (to the heirs of the lessee) are void. For in this case, if the lessee dieth, and his heir enter, the lessor shall have a good action of trespass against him; but not so against the heir of tenant by the custom in some case, &c., for that the custom of the manor in some case [*as where copyhold of inheritance*, Sect. 81] may aid him to bar his lord in an action of trespass, &c.

SECT. CIV. *Full age.—Age of discretion.*—Note, that the full age of male and female, according to common speech, is said the age of twenty-one years. And the age of discretion is called the age of fourteen years; for at this age the infant which is married within such age to a woman may agree or disagree to such marriage. [Sect. 259.]

The age for consent to matrimony is fourteen in males and twelve in females. If either of them be under the proper age, there is a right in *that* party, on arriving at the proper age, to disagree to the marriage, and in that case the marriage is void without any divorce or sentence of an ecclesiastical court. (Co. Litt. 33 a, 79 a b, and note (1) by Hargrave; 1 Black. Com. 436, 463; 2 Steph. Com. 282.) Between such age and twenty-one the consent of parents or guardians is required;

the absence of it does not, however, invalidate the marriage. (2 Steph. Com. 282, 287, 1st edit.)

SOCAGE.

SECT. CXVII. *Tenure in socage defined.*—Tenure in socage is, where the tenant holdeth of his lord his tenement by certain [Sect. 160] service for all manner of services, so that the service be not knight's service. As where a man holdeth his land of his lord by fealty and certain rent, for all manner of services.

NOTE.—All tenures are, since the 12 Chas. 2, c. 24, which abolished the military tenures, in effect socage tenures, except the tenures by copy of court roll (Sect. 73) and by frank-almoign (Sect. 133); and that statute restrains the sovereign from creating any other tenure than socage. It extends the father's [Note to Sect. 123] power of appointing *guardians* by deed or will, which by the 4 & 5 Phil. and Mary (the first statute conferring such a power, but now repealed by 9 Geo. 4, c. 31; 2 Steph. Com. 340) was restricted to female children, to children of both sexes, and thus supplied the means of still further preventing guardianship in socage. In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the above-mentioned statute of Chas. 2 c. 24. (Co. Litt. 93 b, n. (3); 2 Black. Com. 79; 1 Steph. Com. 192.)

SECT. CXXII. *Rent-service defined.*—Also, in all cases where the tenant holdeth of his lord to pay unto him any certain rent, this rent is called rent-service. [See Sect. 213.]

SECT. CXXIII. *Guardianship in socage where heir not fourteen years old.*—Next friend to whom the inheritance cannot descend shall be the guardian.—Also, in such tenures in socage, if the tenant have issue and die [without having devised his lands, Co. Litt. 87 b, n. (1), 88 b, n. (13)], his issue being within the age of fourteen years, then the next friend of that heir [that is, heir to the lands, Co. Litt. 87 b, n. (1), 88 b, n. (13)] to whom the inheritance cannot descend shall have the wardship of the land and of the heir until the age of fourteen years, and such guardian is called guardian in socage. For if the land descend to the heir of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. [Sect. 4.] And if land

descend to the heir of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such lands or tenements. [Sect. 4.] And when the heir cometh to the age of fourteen years complete, he may enter and oust the guardian in socage, and occupy the land himself, if he will. And such guardian in socage shall not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heir; and of this he shall render an account to the heir, when it pleaseth the heir, after he accomplisheth the age of fourteen years. But such guardian upon his account shall have allowance of all his reasonable costs and expenses in all things, &c.

NOTE.—The rule of our law (which differs from the civil law in this respect), that the guardian in socage must be the next friend not entitled to inherit the estate, has been the subject of much comment. (See 2 Black. Com. 461, 462; Co. Litt. 88 b, n. (6); 2 P. Williams, 262, per Ld. Chanc. Macclesfield; Rex v. Sutton, 5 Nev. and M. 353.)

Littleton speaks of the guardian accounting with the heir; the mode of compelling him to do so formerly was by an action of account, but the usual course now is by a bill in equity. (2 Steph. Com. 345.)

The occurrence of guardianship in socage is rendered unfrequent, because the infant must take by *descent*, and not by *will*, and the *father* (but not the mother, Exp. Edwards, 3 Atkyns, 519; Vellareal v. Mellish, 2 Swanston, 536) may, under the 12 Chas. 2, c. 24 [Note to Sect. 117], by deed or will attested by two witnesses, appoint who shall be guardians of his children after his death, and such appointment will prevent guardianship in socage (Co. Litt. 88 b, n. (13 & 15); 2 Steph. Com. 340; 2 Jarman & Bythewood's Convey. by Sweet, 559, *et seq.*; Talbot v. Earl of Shrewsbury, 4 Jurist, 380). Such guardians have no more power than guardians in socage, and are but trustees. (Beaufort v. Berty, 1 P. Will. 703; Gilbert v. Schwenck, 9 Jur. 693.)

FRANK-ALMOIGN.

SECT. CXXXIII. *Tenure in frank-almoign defined, and its origin.*—Tenant in frank-almoign is, where an abbot, or prior, or another man of religion, or of holy church, holdeth of his lord in frank-almoign; that is to say in Latin, in *liberam eleemosinam*, that is, in free alms. And such tenure began first in old time. When a man in old time was seised of certain lands or tenements in his demesne as of fee, and of the

same land infeoffed an abbot and his convent, or prior and his convent, to have and to hold to them and their successors, in pure and perpetual alms, or in frank-almoign; or by such words, to hold of the grantor, or of the feoffor, and his heirs in free alms: in such case the tenements were holden in frank-almoign.

NOTE.—This tenure of frank-almoign is that by which almost all ancient monasteries and religious houses held their lands; and by which the *parochial clergy*, and very many ecclesiastical and eleemosynary foundations, *hold them at this day*; the nature of the service being upon the Reformation altered, and made conformable to the purer doctrines of the Church of England. (2 Black. Com. 101; Third Real Prop. Rep. p. 7.)

PETIT SERJEANTY.

SECT. CLIX. *Petit serjeanty defined.*—Tenure by petit serjeanty is, where a man holds his land of our sovereign lord the king, to yield to him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an arrow, or divers arrows, or to yield such other small things belonging to war.

NOTE.—The tenure of petit serjeanty is a dignified branch of the tenure by socage, from which it only differs in name on account of its reference to war. (Co. Litt. 108 b, n. (1); 2 Scriven's Copyh. 705, n. (60); 1 Steph. Com. 198; 2 Black. Com. 82.)

SECT. CLX. *Petit serjeanty is but socage.*—And such service is but socage in effect, because that such tenant by his tenure ought not to go, nor do, any thing in his proper person, touching the war, but to render and pay yearly certain [Sect. 117] things to the king, as a man ought to pay a rent.

SECT. CLXI. *The holding must be of the king.*—And note, that a man cannot hold by petit serjeanty, but of the king, &c.

TENURE IN BURGAGE.

SECT. CLXII. *Tenure in burgage defined.*—Tenure in burgage is, where an ancient borough is of which the king is lord, and they that have tenements within the borough hold of the king [or other lord, Sect. 163] their tenements; that every

tenant for his tenement ought to pay to the king [*or other lord*, Sect. 163] a certain rent by the year, &c. And such tenure is but tenure in socage.

SECT. CLXIII. *It is burgage where held of a lord.*—And the same manner is, where another lord spiritual or temporal is lord of such a borough, and the tenants of the tenements in such a borough hold of their lord to pay, each of them yearly, an annual rent.

SECT. CLXIV. *Antiquity of boroughs.*—And it is called tenure in burgage, for that the tenements within the borough be holden of the lord of the borough by certain rent, &c. And it is to be known that the ancient towns called boroughs be the most ancient towns that be within England; for those towns that now be cities or counties, in old time were boroughs, and called boroughs; for of such old towns called boroughs come the burgesses of the parliament to the parliament, when the king hath summoned his parliament.

SECT. CLXV. *Custom of Borough-English explained.*—Also, for the greater part, such boroughs have divers customs and usages, which are not had in other towns. For some boroughs have such a custom, that if a man have issue many sons, and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir unto his father by force of the custom; the which is called Borough-English.

In the Third Real Property Report, p. 8, it is said, "The custom of Borough-English prevails in several cities, and ancient boroughs, and districts of smaller or larger extent, adjoining to them in different parts of the kingdom. The land is held in socage, but according to the custom it descends to the youngest son, in exclusion of all the other children of the person dying seised. In some places, this peculiar rule of descent is confined to the case of *children*, in others the custom extends to *brothers* and other male *collaterals*. (Burt. pl. 1327.) * * * The custom of Borough-English governs the descent of copyhold land in various manors." (1 Black. Com. 75; 2 *Id.* 83; 1 Steph. Com. 53, 198; 2 Preston's Abst. 423; Co. Litt. 110 b, n. (3), 175 b, n. (4). Also see *post*, Sect. 211.)

SECT. CLXVI. *Dower of burgage lands.*—Also in some boroughs, by custom, the wife shall have for her dower all the tenements which were her husband's. (See *ante*, Sect. 37.)

SECT. CLXVII. *Lands of burgage tenure might have been devised, when lands of other tenure could not.*—Also, in some boroughs, by the custom, a man may devise by his testament [Sect. 287] his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise, he to whom such devise is made, after the death of the deviser, may enter into the tenements so to him devised, to have and to hold to him, after the form and effect of the devise, without any livery of seisin thereof to be made to him, &c.

It may be observed that by our law a man might bequeath his personal property, though anciently only a portion thereof (2 Black. Com. 491); and so, prior to the Conquest, he might devise his real property (2 Black. Com. 373; Wright's Ten. 172; 1 Steph. Com. 547). However, after the Conquest, no estate, greater than for term of years, could be disposed of by testament (2 Black. Com. 375; 1 Steph. Com. 548); except only in Kent (Robins. Gavelk. 238), and in some ancient burghs as abovesaid by Littleton, and a few particular manors. The 7 Will. 4 & 1 Vict. c. 26 (which, however, only applies to wills executed or re-executed on or after the 1st January, 1838), enables every person (except persons under disabilities) to dispose by will of all his property of what nature soever, comprising his customary freeholds and copyholds, without surrender and before admittance, and also comprising estates *pur autre vie*, contingent interests, rights of entry, and even real estates acquired after the execution of the will. (1 Steph. Com. 550.) It is to be observed, that though Littleton says that a man might, by the custom, devise lands which he hath at the time of his death, he did not mean that lands purchased subsequently to the will would pass, but only that the lands mentioned in the will would, if they continued to belong to the deviser at the time of his death, pass thereby. (Cowper, 90; 7 Adol. & Ellis, 212.)

SECT. CXLVIII. *Husband cannot grant to his wife, but he may devise to her.*—Also, though a man may not grant, nor give, his tenements to his wife during the coverture, for that his wife and he be but one person in the law; yet by such custom [*and now without such custom*] he may devise by his testament his tenements to his wife, to have and to hold to her in fee simple or in fee tail, or for term of life, or years, for that such devise taketh no effect but after the death of the deviser. And if a man at divers times makes divers testa-

ments and divers devises, &c., yet the last devise and will made by him shall stand, and the others are void.

It must be borne in mind, that the husband may even at law grant to the wife by the intervention of trustees, and, in equity, without them (1 Atkyns, 271; 3 P. Will. 334); and he may surrender a copyhold to her use. (Co. Litt. 3 a, n. (1); 4 Coke's Rep. 29; 1 Roper's Hush. and W. 53; 2 Steph. Com. 297, 305, 306; 2 Barn. and Adol. 447.)

A man may have two valid wills, if the latter does not revoke the former, and does not make a different and incompatible disposition of the same property. (Coward v. Marshall, Cro. Eliz. 721; Walpole v. Cholmondeley, 7 Term R. 138; Doe v. Pedley, 1 Mees. and Wels. 675.)

SECT. CLXIX. *Devise to superstitious uses.*—*Devise to executors to sell.*—Also, by such custom [*and without it*] a man may devise by his testament, that his executors may alien and sell [Sect. 383] the tenements that he hath in fee simple, for a certain sum, to distribute for his soul. In this case, though the devisor die seised of the tenements, and the tenements descend unto his heir; yet the executors, after the death of the testator, may sell the tenements so devised to them, and put out the heir, and thereof make a feoffment, alienation, and estate, by deed or without deed, to them to whom the sale is made [see Sect. 383, and Note]. And so ye may here see a case, where a man may make a lawful estate, and yet he hath nought in the tenements at the time of the estate made. And the cause is, for that the custom and usage is such. For a custom, used upon a certain reasonable cause, depriveth the common law.

NOTE.—A devise to sell and to apply the proceeds in saying masses for the benefit of the testator's soul, &c., would now be void, as being for a superstitious purpose, and the testator's representative would take. (See Att. Gen. v. Fishmongers' Co. 2 Beav. 151; 1 Jarm. Wills, 188, 189.)

SECT. CLXX. *Custom and prescription.*—*Time of memory.*—*Limitation in a writ of right.*—And note, that no custom is to be allowed, but such custom as hath been used by title of prescription [Sect. 183], that is to say, from time out of mind. But divers opinions have been concerning time out of mind, &c., and title of prescription, which is all one in the law. For some have said that time out of mind should be said from time of limitation in a writ of right [*abolished* by 3 & 4 Will. 4, c. 27, s. 36], that is to say, from the time of King Richard the First, after the Conquest, as is given by the statute of West-

minster the First [3 Edw. 1, c. 38], for that a writ of right was [*when it existed*] the most high writ in its nature that might be. And others have said, that there is also another title of prescription that was at the common law before any statute of limitation of writs, &c., and that it was, where a custom or usage, or other thing, hath been used, from time whereof mind of man runneth not to the contrary, and they have said that this is proved by the pleading; where a man will plead a title of prescription of custom he shall say, that such custom hath been used from time whereof the memory of man runneth not to the contrary, that is as much to say, when such a matter is pleaded, that no man then alive hath heard any proof of the contrary, nor hath any knowledge to the contrary; and insomuch that such title of prescription was at the common law, and not ousted by any statute, *ergo*, it abideth as it was at the common law; and the rather, insomuch that the said limitation of a writ of right is of so long time passed. *Ideo quære de hoc*. And many other customs and usages have such ancient boroughs.

NOTE.—Care must be taken to distinguish between custom and prescription. Custom is properly a *local* usage, and prescription a *personal* one, attaching to a man and his ancestors, or those whose estate he hath. (Co. Litt. 113 b; 2 Black. Com. 263; Burton's Comp. pl. 1037—1040; 4 Coke's Rep. 31 b; Shelf. Real Prop. Stats. 55, 3rd edit.)

As to the time of prescription and of customary rights, we may observe that though, as above stated, they should formerly have existed from the beginning of the reign of Rich. 1, yet, if there had been an enjoyment for a period of 20 years, the courts would, in the absence of evidence from the other party of the right having in fact originated since the beginning of the reign of Rich. 1, and provided that the enjoyment was not under a grant or licence from the party interested, nor without his knowledge, presume an immemorial usage, so as to sustain the prescription or customary right. The Legislature has now stepped in, and by the 2 & 3 Will. 4, c. 71, these judicial dicta have been, with some variations, made part of the statute law. The statute enacts, that where there shall have been an enjoyment of *rights of common and all other profits or benefits to be taken and enjoyed from or upon any land* (with the exception of tithes, rents, and services) by any person claiming right thereto, without interruption, for *thirty* years next before the commencement of any suit upon the subject, the prescriptive claim shall no longer be defeated (as it would have been before the Act) by showing only that the enjoyment commenced at a period

subsequent to the era of legal memory. There is a provision, however, that it may be defeated in any other way in which it was defeasible before the Act passed. But where there has been an enjoyment for as much as *sixty* years, the claim is to be absolute and indefeasible, except only by proof that such enjoyment took place under some deed, or written consent, or agreement; while, on the other hand, if the period of enjoyment shall have been less than thirty years, it is to be wholly unavailable, even to raise the slightest presumption of right. The Act makes similar provisions with respect to another class of incorporeal hereditaments, viz., any "way or other easement, or any watercourse, or the use of any water, to be enjoyed upon, over, or from any land or water," and "the access or use of light to or for any dwelling-house, workshop, or other building;"—but with this difference, that the periods constituting a prescriptive right in the case of ways or other easements, and waters, are *twenty* and *forty* years in lieu of thirty and sixty respectively, and that an uninterrupted enjoyment of *lights* for *twenty* years constitutes, in every case, an absolute and indefeasible right to them, unless it shall appear that the enjoyment took place under some deed, or written consent, or agreement. There is, moreover, a provision with respect to ways and waters, that when the land over which such rights as these are claimed has been held for term of life, or a term exceeding three years, such term shall be excluded from the computation of the forty years, in the event of the person who may be entitled in reversion resisting the claim within three years after the term determines. (2 Steph. Com. 39, 40.)

SECT. CLXXI. *Towns and boroughs*.—Also, every borough is a town, but not *à converso*.

VILLENAGE.

SECT. CLXXXIV. *Advowson, common of pasture, &c., may be appendant to a manor*.—And it is to be understood, that nothing was named regardant to a manor, &c., but a villein. But certain other things, as an advowson and common of pasture, &c., are named appendant to the manor, or to the lands and tenements, &c.

SECT. CLXXXVIII. *Bastard cannot be heir to any one*.—Also a bastard is in law *quasi nullius filius*, because he cannot be heir to any.

SECT. CXC VII. *Outlawry may be pleaded.*—Where a man is outlawed upon an action of debt or trespass, or upon any other action or indictment, the tenant or the defendant may show all the matter of record and the outlawry, and demand judgment, if he shall be answered; because he is out of the law to sue an action during the time that he is outlawed.

SECT. CXC VIII. *Plaintiff's alienage.*—If an alien, which is born out of the legiance of our sovereign lord the king, will sue an action real or personal, the tenant or defendant may say that he was born in such a country, which is out of the king's allegiance, and ask judgment if he shall be answered.

NOTE.—An alien enemy is disabled to sue, but the plea must state not only that the plaintiff was born in a foreign country, but that he came here without letters of safe conduct from the sovereign. (8 Term Rep. 166.) But alienage is not a good plea in a personal action brought by an alien *amv*, even though he be resident abroad. (Co. Litt. 129 b; Comyns' Dig. tit. "Abatement" (E. 4); *Pisani v. Lawson*, 6 Bing. N. C. 30; S. C. 8 Scott, 180.)

SECT. CC II. *Once a parson, always a parson.*—He which is professed a monk shall be a monk, and as a monk shall be taken for term of his natural life, unless he be deraigned by the law of holy church.

NOTE.—This is still law with respect to our clergy, and it was on this ground that Mr. Horne Tooke was refused admittance as a member of the Society of Lincoln's Inn, with a view to his being called to the bar. (1 Legal Exam. 110, 111; 1 Lord Brougham's Hist. Sketches, &c. (Ser. 2) 131, 12mo.)

SECT. CC X. *Custom of gavelkind.*—All male issue inherit.—But in the county of Kent, where lands and tenements are holden in gavelkind, there, where, by the custom and use out of mind of man, the issues male ought equally to inherit, this custom is allowable, because it standeth with some reason; for every son is as great a gentleman as the eldest son is, and perchance will grow to greater honour and valour, if he hath anything by his ancestors, or otherwise, peradventure, he would not increase so much, &c. [See Sect. 265, and Note thereto.]

SECT. CC XI. *In Borough-English the youngest son inherits.*—Also, where by the custom called Borough-English, in some borough, the youngest son shall inherit all the tenements, &c., this custom also stands with some certain reason; because that

the younger son (if he lack father and mother), because of his younger age, may least of all his brethren help himself, &c. [See *ante*, Sect. 165.]

RENTS.

SECT. CCXIII. *Three sorts of rents.* 1. *Rent-service, and what it is.*—Three manner of rents there be, that is to say, rent-service, rent-charge, and rent-seck. Rent-service is, where the tenant holdeth his land of his lord by fealty and certain rent, or by other services and certain rent. And if rent-service, at any day that it ought to be paid, be behind, the lord may distrain for that of common right.

NOTE.—Rents must issue out of *hereditaments corporeal*, both of which terms must be attended to. (2 Black. Com. 41; Gilbert on Rents, 20, *et seq.* ed. 1792; 2 Steph. Com. 24.) Thus a rent cannot issue out of chattels; but where they are demised with corporeal hereditaments, the whole rent will issue out of the latter alone. (Spencer's Case, 5 Coke's Rep. 17b; Newman v. Henderson, 2 New Rep. 224.) So, generally speaking, at common law, on the grant of a *subject* (though it is otherwise of the sovereign), no rent can issue out of any hereditament but such as is of a *corporeal* nature, because to things lying in grant no recourse can, from their nature, be had for a distress. But by 5 Geo. 3, c. 17, ecclesiastical persons are enabled to grant leases of tithes and other incorporeal hereditaments, and reserve rents upon them, recoverable by action of debt. (Burton's Comp. pl. 1218; Co. Litt. 44 b, n. 3.)

SECT. CCXIV. *A distress may be had for rent-service of common right.*—And if a man [*seised in fee*] will give lands or tenements to another in the tail [*the reversion remaining in the donor*, Sect. 215], yielding to him certain rent by the year, he of common right may distrain for the rent behind, though that such gift was [*formerly*] made without deed, because that such rent is rent-service. In the same manner it is if a lease be made [*by one having a larger estate, and in whom consequently there will remain a reversion*, Sect. 215] to a man for life, or the life of another, rendering to the lessor certain rent, or for term of years rendering rent.

NOTE.—By the Statute of Frauds (29 Chas. 2, c. 3), the conveyance must have been put into writing, though a *deed* was not thereby required, at least, not so far as concerned

corporeal things. But by sect. 3 of the 8 & 9 Vict. c. 106, it is enacted that, after the 1st of October, 1845, a feoffment, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed. (See Sect. 59, Note.)

SECT. CCXV. *On reservation of rent-service, the reversion must be in the donor. Reservation of rent without deed, and without retaining reversion, is void.*—But in such case, where a man upon such a gift or lease will reserve to him a rent-service, it behoveth that the reversion of the lands and tenements be in the donor or lessor. For if a man will make feoffment in fee, or will give lands in tail, the remainder over in fee simple, without deed [*as formerly he might*, Sect. 214], reserving to him a certain rent, this reservation is void, for that no reversion remains in the donor, and such tenant holds his land immediately of the lord, of whom his donor held, &c.

NOTE.—Littleton merely means that the reservation in the case put is void as a rent-service; it would not, according to the best opinions, be a fee farm rent. (Co. Litt. 143 b, n. 5; Selw. N. P. 668, n. 2, 11th edit.) It is, however, a rent-seck, and may be distrained for under the 4 Geo. 2, c. 28, s. 5, mentioned in Note to Sect. 217. (*Musgrave v. Emmer-son*, 11 Jur. 734.)

SECT. CCXVI. *Before the statute of quia emptores terrarum, reservation of a rent on an alienation in fee was a rent-service.*—And this is by force of the statute of *quia emptores terrarum*. For before that statute, if a man had made a feoffment in fee simple, by deed or without deed [*as he might then have done*, Sect. 59, Note], yielding to him and to his heirs a certain rent, this was a rent-service, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service as the feoffor did hold over of his lord next paramount.

NOTE.—The statute of *quia emptores terrarum* (18 Edw. 1, c. 3) enacted that it might be lawful for every free man to alien all or any part of his lands, to be held not of himself, but of the immediate superior lord (*Burton's Comp.* pl. 1005), by the same services and customs by which the tenant himself held them. This statute (with others) has put an end to the subinfeudation of fee simple estates. Where a person seised in fee grants for life or in tail, reserving the reversion in himself, the grantee of the particular (Co. Litt. 32 a, n.; *Noy's Max*, 365, Byth. ed.; 2 *Black. Com.* 165)

estate holds of the reversioner, and he of the chief lord; where such a person grants for life or in tail, with the remainder over in fee simple, both the tenant of the particular estate and the remainder man hold of the chief lord. (Co. Litt. 327 a, n. (2), 365 a, n. (1), 384 a, n. (1); Comyns' Dig. tit. "Seigniorie;" 1 Steph. Com. 215, 221, 427; 2 Black. Com. 91.)

SECT. CCXVII. *On gift in tail, &c., remainder over, the rent being reserved to donor, &c., with a power of distress, is a rent-charge; if no power of distress, it is a rent-seck.*—But if a man, by deed indented, at this day maketh such a gift in fee tail, the remainder over in fee; or a lease for life, the remainder over in fee, or a feoffment in fee; and by the same indenture he reserveth to him and to his heirs a certain rent, and that if the rent be behind, it shall be lawful for him and his heirs to distrain, &c., such a rent is a rent-charge; because such lands or tenements are charged with such distress by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heirs a certain rent, without any such clause put in the deed that he may distrain, then such rent is rent-seck; for that he could not [formerly] come to have the rent, if it were denied, by way of distress; and if in this case he were never seised of the rent, he was without remedy [see Sect. 225, Note], as shall be said hereafter.

NOTE.—Littleton, at the end of the above section, lays it down that for a rent-seck there can be no distress, but by 4 Geo. 2, c. 28, s. 5, every person, body politic and corporate, may have the like remedy by distress, and by impounding and selling the same, in cases of rent-seck, rents of assize, and chief rents, which have been duly answered or paid, for the space of three years within the space of twenty years before the 23rd day of January, 1731, or shall be thereafter created, as in case of rent reserved upon lease. (3 Black. Com. 43; *Vigers v. Dean &c. of St. Paul's*, 14 Jur. 1017; S. C. 19 Law Journ. N. S. Q. B. 64.) Notwithstanding this statute, there cannot be a distress on a reservation of a rent on a lease for years where there is no reversion in the lessor, and no power of distress is given; for such a rent is not a rent-seck within the above statute. (Selwyn's *Nisi Prius*, tit. "Distress;" Burton's *Comp.* pl. 1111; 3 Preston on Abstracts, 54; 2 Jarman's *Convey.* by Sweet, 40, 44; 4 *Id.* 346.)

SECT. CCXVIII. *Also a grant of a rent out of land, if with*

power of distress, will be a rent-charge; if without such power a rent-seck.—Also, if a man seised of certain land, grant, by a deed poll, or by indenture, a yearly rent to be issuing out of the same land, to another in fee, or in fee tail, or for term of life, &c., with a clause of distress, &c., then this is a rent-charge; and if the grant be without clause of distress, then it is a rent-seck. And note, that rent-seck *idem est quod redditus siccus*; for that no distress was [at the common law] incident unto it.

A reservation in a will of a rent-charge without an express power of distress will enable the devisee to distrain. (Watk. Conv. 243, n. a.) It will be observed that Littleton does not speak of rents reserved on leases for years, as to which, *where there is no reversion in the lessor and no power of distress*, modern writers say that the payments are not strictly rent, but *sums in gross*, while they treat reservations with a clause of distress, or, where the lessor has a reversion, as proper rents. In *Baker v. Gostling* (4 Moo. & Scott, 539; 1 Bing. N. C. 19, S. C.), Tindal, C. J., in delivering judgment, said, "then it is asked, whether this is a covenant for the payment of a gross sum, or for the payment of rent? Upon all the authorities I consider it a payment in the nature of a rent. The cases of *Newcome v. Hardy*, Carth. 161, and *Lloyd v. Langford*, 2 Mod. Rep. 175, both referred to by Comyns' Digest. (tit. "Debt," C. E.), show that, where the whole of a term is assigned, a gross sum reserved periodically to the assignor is a payment in the nature of rent. And if it were held otherwise great injustice might be occasioned, as the tenant, if evicted, would have no answer to an action on his covenant for payment of the sum in question; whereas, if it be considered as rent, eviction would be an answer to the lessor's claim."

SECT. CCXXII. *If grantee of rent-charge purchase parcel of the lands out of which it issues, the rent-charge is extinct; otherwise of rent-service.*—Also, if a man hath a rent-charge [Sect. 218] to him and to his heirs issuing out of certain land, if he purchase any parcel of this to him and to his heirs, all the rent-charge is extinct, and the annuity also; because the rent-charge cannot by such manner be apportioned. But if a man, who hath a rent-service [Sect. 213], purchase parcel of the land out of which the rent is issuing, this shall not extinguish all, but for the parcel. For a rent-service in such case may be apportioned according to the value of the land. But if one holdeth his land of his lord by the service, to render to his lord yearly at such a feast, a horse, a golden spur, or a clove,

a gilliflower, and such like; if in this case the lord purchase parcel of the land, such service is taken away; because such service cannot be severed nor apportioned.

SECT. CCXXIII. *Rent-service is apportionable where reversioner purchases part of the lands.*—If the immediate reversioner of lands let at a rent purchase part of such lands, the rent shall be apportioned.

SECT. CCXXIV. *Where parcel of the lands comes to the grantee of a rent-charge, by descent, there shall be an apportionment.*—Also, if a man hath a rent-charge, and his father purchase parcel of the tenements charged in fee, and dieth, and this parcel descends to his son, who hath the rent-charge, now this charge shall be apportioned according to the value of the land, as is aforesaid of rent-service; because such portion of the land purchased by the father cometh not to the son by his own act [Sect. 12], but by descent, and by course of law.

SECT. CCXXV. *On grant of rent-service, reserving the fealty, grantee has but a rent-seck.*—Also, if there be lord and tenant, and the tenant holds of his lord by fealty and certain rent, and the lord grants the rent by his deed to another, &c., reserving the fealty to himself, and the tenant attorns [Sect. 551] to the grantee of the rent, now this rent is rent-seck [Sect. 218] to the grantee; because the tenements are not holden of the grantee of the rent, but are holden of the lord who reserved to him the fealty.

The subject of *attornment* is treated of by Littleton in Sect. 551, *et seq.*, but as he here makes such frequent mention of it, as he does also of the kindred subjects of *seisin of rents*, we think it will be well to give a short explanation of those terms. At the common law there could be no distress unless there had been a *seisin* of the rent, though a *seisin* in law was sufficient. Such a *seisin* arose by the *attornment* of the tenant. In order to support an assize or other real action, an actual *seisin* of the rent must have been previously obtained, that is, there must have been a receipt of the rent or some part thereof. But by 4 Anne, c. 16, all grants or conveyances made after the 1st day of Trinity Term, 1706, of any manors or rents, or of the reversion or remainder of any lands, shall be effectual *without any attornment* of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment

had been had and made. It has lately been decided that a lease by a remainder-man, without any entry by the lessee (Sect. 58, Note), operates not merely by way of *interesse termini*, but as a grant of an estate or interest out of a remainder, just in the same manner as if the tenant of the preceding estate had attorned thereto. (Doe v. Brown, 17 Jurist, 1161.) It may be remarked that, as the statute is not retrospective, a seisin in law of a rent-charge created before it must be shown. (See 2 Jarm. and Bythew. Convey. 24, 25; see Vigers v. Dean, &c., of St. Paul's, 14 Jurist, 1020.)

SECT. CCXXVII. *Rent-service being severed cannot be granted with a power of distress.*—When a rent, which was once rent-service, is severed by the grant of the lord from the other services, it cannot be said to be rent-service, for that it hath not fealty unto it, which is incident to every manner of rent-service; and, therefore, it is called rent-seck. And the lord cannot grant such a rent with a distress, as it is said.

NOTE.—But a rent-seck may now (see Note, Sect. 217) be distrained for. If the rent-service were recoverable by action of debt, it continues to be so, when reduced to a rent-seck. (Burton's Comp. pl. 1096; Allen v. Bryen, 5 Barn. and Cres. 512.)

SECT. CCXXVIII. *If lessor grant the rent reserved, saving the reversion, the grantee has but a rent-seck; otherwise, if the reversion be granted.*—Also, if a man let to another lands for term of life, reserving to him certain rent, if he grant the rent to another by his deed, saving to himself the reversion of the land so letten, &c., such rent is but a rent-seck, because that the grantee hath nothing in the reversion of the land, &c. But if he grant the reversion of the land to another for term of life, and the tenant attorn [Sect. 225, Note], &c., then hath the grantee the rent as a rent-service; for that he hath the reversion for term of life.

SECT. CCXXIX. *By the grant of the reversion, the rent-service due by a lessee will pass.*—And so it is to be intended, that if a man [seised in fee] give lands or tenements in tail, yielding to him and to his heirs a certain rent, or letteth land for term of life, rendering a certain rent, if he grant the reversion to another, &c., and the tenant attorn [Note to Sect. 225], all the rent and service pass by this word (reversion), because that such rent and service in such case are incident to the reversion, and pass by the grant of the reversion. But albeit that he

granteth the rent to another, the reversion doth not pass by such grant, &c.

This section is a good illustration of the maxim, "*Accessorium non ducit sed sequitur suum principale.*"

OF PARCENERS.

SECT. CCXLI. *Parceners are either by the common law or by custom—Parceners by the common law what, and why so called?*—Parceners are of two sorts, to wit:—Parceners according to the course of the common law, and parceners according to the custom. [Sect. 265.] Parceners after the course of the common law are, where a man, or woman, seised of certain lands or tenements in fee simple or in tail, hath no issue but daughters, and dieth, and the tenements descend to the issues, and the daughters enter into the lands or tenements so descended to them, then they are called parceners, and be but one heir to their ancestor. [Sect. 313.] And they are called parceners, because [formerly, Note, Sect. 247] by the writ which was called *breve de partitione facienda*, the law would have constrained them, that partition should have been made among them. And if there be two daughters to whom the land descendeth, then they be called two parceners; and if there be three daughters, they be called three parceners; and four daughters, four parceners; and so forth.

NOTE.—That several coparceners make but one heir, see Sect. 313; 2 Black. Com. 187; Burton's Comp. pl. 316; Co. Litt. 163 b, [c]; Com. Dig. tit. "Parcener" (A. 3). As a consequence of this doctrine, in copyholds all the coparceners may be admitted by one copy, and shall pay only one set of fees. (2 Bing. 273; 3 Barn. and Cres. 175.) However, though as to these and such like purposes, coparceners have a joint seisin, as to others they have a several seisin—in fact, they are said to have a several seisin as between themselves, and a joint seisin as regards strangers. Thus, they may convey to each other by feoffment or release (Gilb. Ten. 73; Co. Litt. 169 a, Note by Hargrave), which shows a several seisin, and there is no survivorship between them. (Sect. 280, *ad fin*; Watk. Princ. Convey. 132; Burton's Comp. pl. 317.)

SECT. CCXLII. *Several daughters, sisters or aunts are coparceners, but one alone is not.*—Also, if a man seised of tenements in fee simple, or in fee tail, dieth without issue of his body begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where

he hath no sisters, but the lands descend to his aunts, they are parceners, &c. But if a man hath but one daughter, she shall not be called parcener, but she is called daughter and heir, &c.

NOTE.—Where there is but one daughter, &c., that one holds in *severalty*, that is, the same as though none other could have been entitled. (2 Black. Com. 179, 191; 1 Steph. Com. 311, 323.) So much of this section as relates to an estate tail must be understood to intend an estate tail limited to the father of the deceased party, as it is evident that an estate limited to a man and the heirs of his body cannot descend to his sisters.

SECT. CCXLIII. *Several sorts of partition.*—1. *By agreement.*—And it is to be understood that partition may be made in divers manners. One is, when they agree to make partition, and do make partition, of the tenements, as if there be two parceners, to divide between them the tenements in two parts, each part by itself in severalty and of equal value; and if there be three parceners, to divide the tenements in three parts by itself in severalty, &c.

NOTE.—By partition the shares allotted are held in severalty (Note, Sect. 242), whereas by mere alienation to a third party, the coparcenary continues as to the non-alieneing coparceners, but they are tenants in common with the alienee. (Sect. 276; Burton's Comp. pl. 320; 2 Black. Com. 189; Sect. 309.) The same is the case with joint tenants. (Sect. 294.) Partition by agreement in writing (unless under seal) is not now binding at *law* (8 & 9 Vict. c. 106, s. 3), but it is in equity. (See Note to Sect. 250.)

SECT. CCXLIV. *Partition by agreement, on division made by third party.*—*Eldest daughter has first choice.*—Another partition there is, viz.:—To choose by agreement between themselves certain of their friends, to make partition of the lands or tenements in form aforesaid. And in these cases, after such partition, the eldest daughter shall choose first one of the parts so divided, which she will have for her part, and then the second daughter next after her another part, and then the third sister another part, then the fourth another part, &c., if so be that there be more sisters, &c., unless it be otherwise agreed between them. For it may be agreed between them, that one shall have such tenements, and another such tenements, &c., without any primer election.

On a writ of partition, the eldest sister had no right to a first choice. (Litt. s. 249.)

SECT. CCXLV. *The eldest sister's share is called initia pars.*—And the part which the eldest sister hath is called in Latin *initia pars*. But if the parceners agree that the eldest sister shall make partition of the tenements in manner aforesaid, and if she do this, then it is said, that the eldest sister shall choose last for her part, and after every one of her sisters, &c.

SECT. CCXLVII. *Formerly there was a partition by writ.*—Also, there was [*formerly*] another partition. As if there were four parceners, and they would not agree to a partition to be made between them, then the one might have had a writ of *partitione facienda* against the other three, or two of them might have had a writ of *partitione facienda* against the other two, or three of them might have had writ of *partitione facienda* against the fourth, at their election.

NOTE.—Partition by writ is abolished by 3 & 4 Will. 4, c. 27, s. 36. (1 Steph. Com. 317, 323; 6 Jarman's Convey. by Sweet, 599.) In order that parties might have complete partition, even prior to the abolition of writs of partition, courts of equity exercised jurisdiction in decreeing partition, but it was said that if the party had a *legal* right equity would refer him to his writ at common law; but as now such legal right is not available at law by reason of the abolition of the writ of partition, it would seem that courts of equity will, in all cases, give relief. (2 Atkyns, 380; 1 Vesey and Beam. 556.) It was formerly considered (Co. Litt. 59 a, n. (1); 3 Bart. Convey. 488) that partition could not be had of *copyholds*, though some (2 Watk. Copyh. 194 e; 6 Jarm. Convey. by Sweet, 598) have been of a contrary opinion, but without sufficient warrant, as it was recently decided that partition could not by the common law be had of copyholds. (Horncastle v. Charlesworth, 11 Simons, 315, S. C. 4 Jur. 1179.) It is however expressly enacted by 4 & 5 Vict. c. 35, s. 85, that courts of equity may decree partition of copyholds, and, it seems, of customary freeholds (Jope v. Moreshead, 6 Beav. 213), but nevertheless the consent of the lord must, it is said, be obtained.

SECT. CCL. *Partition by agreement might formerly have been by parol.*—And note that partition by agreement between parceners might [*formerly*] have been made by law between them, as well by parol without deed, as by deed.

NOTE.—By 8 & 9 Vict. c. 106, s. 3, a partition of any tenements or hereditaments, not being copyhold, made after the 1st day of October, 1845, shall be void at law unless made by deed. However, in *equity* a parol agreement for a partition

will be enforced, particularly if acquiesced in for any length of time, provided the proper parties have entered into the agreement. (Co. Litt. 169 b; 1 Atkyns, 542; 6 Jarman's Convey. by Sweet, 592; Knollys v. Alcock, 5 Vesey Jun. 148; Comyns' Dig. tit. "Chancery," 4 E.)

SECT. CCLI. *Partition where the property assigned is of unequal value. Rent for equality of partition.*—Also, if two messuages descend to two parceners, and the one messuage is worth twenty shillings per annum, and the other but ten shillings per annum; in this case partition may be made between them in this manner; to wit, the one parcener to have the one messuage, and the other parcener the other messuage; and she which hath the messuage worth twenty shillings per annum, and her heirs, shall pay a yearly rent of five shillings issuing out of the same messuage to the other parcener and to her heirs for ever, because each of them should have equality in value.

NOTE.—Commissioners of partition on proceedings in equity have no power to award sums to be paid for equality of partition. (Mole v. Mansfield, 15 Sim. 41.)

SECT. CCLII. *A distress may be had of rent for equality of partition, though not expressly given.*—And such partition made by parol [*formerly*, Note to Sect. 250] was good enough; and that parcener who shall have the rent, and her heirs, may distrain of common right for the rent in the said messuage worth twenty shillings, if the rent of five shillings be behind at any time, in whose hands soever the same messuage shall come, although [*formerly*] there never were any writing of this made between them for such a rent.

NOTE.—As partitions (except of copyholds) must now be by deed (Note to Sect. 250), the rent will, of course, be created by the same instrument. A fee may exist in such rent without any words of inheritance in the grant, and will be descendible in the same way as the land. (2 Preston on Abst. 71, 72, 431; 4 *Id.* 54; Burton's Comp. pl. 1122.)

SECT. CCLIII. *Rent for equality of partition is a rent-charge.*—In the same manner it is of all manner of lands and tenements, &c., where such rent is reserved to one or to divers parceners upon such partition, &c. But such rent is not rent-service, but a rent-charge of common right had and reserved for equality of partition.

NOTE.—A rent granted to two or more for equality of partition will belong to them as coparceners, and not as joint tenants. (2 Preston on Abstracts, 74; Windham's Case, 5

Coke's Rep. 8 a.) This kind of rent cannot be a rent-service, because there is no tenure of the coparcener who grants it, and it would have been unreasonable to have construed it to be a rent-seck, when for such rents a distress could not formerly have been had [Sect. 218]; hence, therefore, the law has construed this rent to be a rent-charge of common right; or, in other words, has given a distress for the recovery of it, on account of the sister having given a valuable consideration for it. (3 Barton's Elem. Convey. 323.)

SECT. CCLIV. *Parceners always take by descent, and not by purchase.*—And note, that none are called parceners by the common law, but females or the heirs of females, which come to lands or tenements by descent; for if sisters purchase lands or tenements, of this they are called joint tenants, and not parceners.

SECT. CCLV. *Partition by tenants in fee-simple not avoidable for inequality, if of full age. But if made by tenants in tail, it is avoidable by their issue.*—Also, if two parceners of lands in fee simple make partition between themselves, and the part of the one valueth more than the part of the other, if they were at the time of the partition of full age (*scil.*) of twenty-one years [Sects. 104, 259], then the partition shall always remain and be never defeated. But if the tenements (whereof they make partition) be to them in fee tail, and the part of the one is better in yearly value than the part of the other, albeit they be concluded during their lives to defeat the partition, yet if the parcener which hath the lesser part in value hath issue and die, the issue may disagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and so the other may enter and occupy in common the other part allotted to her sister, &c., as if no partition had been made.

SECT. CCLVI. *Where married women are coparceners, they and their husbands make partition, it will not bind the wives after their husbands' death, if unequal.*—Also if two parceners of lands in fee take husbands, and they and their husbands make partition between them, if the part of the one be less in value than the part of the other, during the lives of their husbands the partition shall stand in its force. But albeit it shall stand during the lives of their husbands, yet after the death of the husband that woman which hath the lesser part may enter into her sister's part as is aforesaid, and shall defeat the partition.

NOTE.—Though Littleton speaks of the surviving wife's right to defeat a partition (other than by writ, Co. Litt. 171 a) where the division was unequal, yet it must be borne in mind that the partition is voidable only and not actually void. Therefore the wife may, after her husband's death, confirm the partition either expressly or by her acts, as by leasing or taking possession of the unequal part, receiving the rents, or doing any other like act. (Co. Litt. 166 a, 170 b [h], 171 a; Bacon's Abr. tit. "Leases," (C.); Comyns' Abr. tit. "Parcener," C. 11; Maden v. VEVERS, 5 Beav. 503.)

SECT. CCLVII. *Equal partition binds the wife.*—But if the partition made between the husbands were thus, that each part at the time of the allotment made was of equal yearly value, then it cannot afterwards be defeated in such cases.

NOTE.—It is to be understood that the wives were parties to the partition, for otherwise they would not be bound. (Co. Litt. 166 a; Comyns' Dig. tit. Parcener C. 11.)

SECT. CCLVIII. *Equal partition by infant binds him, but not if unequal, unless he assents after full age.*—Also, if two coparceners be, and the youngest be within the age of twenty-one years, partition is made between them, so as the part which is allotted to the youngest is of less value than the part of the other; in this case the youngest, during the time of her non-age, and also when she cometh to full age (*scil.*) of twenty-one years, may enter into the part allotted to her sister, and shall defeat the partition. But let such parcener take heed, when she comes to her full age, that she taketh not to her own use all the profits of the lands or tenements which were allotted unto her; for then she agrees to the partition at such age, in which case the partition shall stand and remain in its force. But peradventure she may take the profits of the moiety, leaving the profits of the other moiety to her sister.

SECT. CCLIX. *Full age is 21 years—What acts of an infant are void and what voidable.*—And it is to be understood, that when it is said that males or females be of full age, this shall be intended of the age of twenty-one years [Sect. 104]; for if before such age any deed or feoffment [Sect. 635], grant, release, confirmation, obligation, or other writing, be made by any of them, &c., or if any within such age be bailiff or receiver to any man, &c., all serve for nothing, and may be avoided. Also, a man before the said age shall not be sworn in an inquest, &c.

NOTE.—As to the conveyances of infants, there has been much discussion as to what are void and what are voidable only, but the modern doctrine is in favour of holding them to be voidable only. This was laid down by Lord Mansfield in the celebrated case of *Zouch v. Parsons* (3 Burr. 1794), where (adopting the language of Perkins, s. 12) he says, “all such gifts, grants, or deeds, made by infants, which do not take effect by delivery of his hand, are void [except a feoffment by a gavelkind heir, note to Sect. 635]; but all gifts, grants, or deeds, made by infants, by matter in deed, or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate.” His Lordship observed that the words “which do take effect” are essential and exclude letters of attorney, deeds which delegate a mere power, and convey no interest, as to which, see Co. Litt. 52 a, n. (2), 171 b, n. (5), 271 b, n. (1), s. III. (4); 3 Atkyns, 695; Lewin’s Trusts, 92. The case of *Zouch v. Parsons* was not considered as supportable by Mr. Preston (1 Abstracts, 324, 325), Mr. Atherley (Touchstone, n. (f) to p. 233), and other able conveyancers, but it has been always acted on in practice, and the Lord Chancellor of Ireland (*Allen v. Allen*, 2 Dru. and Warr. 307; 1 Con. and Law. S. C.) has said that the law there laid down is quite correct, and he held accordingly that a deed which takes effect by delivery, and is executed by an infant, is *voidable* only. Also, that a voidable deed is valid until some act is done to avoid it; and it lies upon those who claim in opposition to the deed to show that such act has been done. As to what official acts an infant may do or not, see the judgment of V. C. Turner in *Edlestone v. Collins*, 16 Jurist, 790.

PARCENERS BY CUSTOM.

SECT. CCLXV. *Parceners by the custom of gavelkind lands.*
 —Parceners by the custom are where a man seised in fee simple, or in fee tail, of lands or tenements which are of the tenure called gavelkind [Sect. 270], within the county of Kent, and hath issue divers sons and die, such lands or tenements shall descend to all the sons by the custom, and they shall equally inherit and make partition by the custom as females shall do, and a writ of partition lieth in this case as between females. But it behoveth in the declaration to make

mention of the custom. Also, such custom is in other places of England, and also such custom is in North Wales, &c.

NOTE.—As to gavelkind lands in Wales, we may observe that, by 34 & 35 Hen. 8, the peculiar descent is taken away, and all lands there are made descendible to the eldest son (Co. Litt. 175 b, n. 3). It must be borne in mind that many Acts have been passed for disgavelling lands in Kent and elsewhere. (See Robins. Gavelk. 75; Co. Litt. 140 b, n. 2. And see as to the lost statutes, the case of Doe v. Brydges, 7 Scott's N. R. 333; 13 Law Journ. N. S. C. P. 209.)

SECT. CCLXXVI. *Where there are three parceners one may have partition, and the other two still hold as coparceners.*—Also, another partition may be made between parceners, which varieth from the partitions aforesaid. As if there be three parceners, and the youngest will have partition, and the other two will not, but will hold in parcenary that which to them belongeth without partition; in this case if one part be allotted in severalty [Sect. 242, note] to the youngest sister, according to that which she ought to have, then the others may hold the remnant in parcenary, and occupy in common [Sect. 243, note] without partition, if they will, and such partition is good enough. And if, afterwards, the eldest or middle parcener will make partition between them of that which they hold, they may well do this when they please. But where partition [*formerly*] was made by force of a writ of *partitio facienda*, there it was otherwise; for there it behoved that every parcener should have her part in severalty, &c.

JOINT-TENANTS.

SECT. CCLXXVII. *Who are joint-tenants.*—Joint-tenants are, as if a man seised of certain lands or tenements, &c., have infeoffed two, three, four or more, to have and to hold to them [*and to their heirs, or have leased to them*] for term of their lives, or for term of another's life [see Sect. 283], by force of which feoffment or lease they are seised, these are joint-tenants.

NOTE.—We have made a slight alteration in the above section, to make it conformable with Lord Coke's opinion. (See also Mr. Hargrave's note (2) to Co. Litt. 180, a.)

SECT. CCLXXX. *In joint-tenancy the survivor has the whole, but it is otherwise in coparcenery.*—And it is to be understood, that the nature of joint-tenancy is, that he which surviveth shall

alone have the entire tenancy according to such estate as he hath, if the jointure be continued, &c. [Sects. 286, 287.] As if three joint-tenants be in fee simple, and the one hath issue and die, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second joint-tenant hath issue and die, yet the third which surviveth shall have the whole tenements to him and to his heirs for ever. But otherwise it is of parceners; for if three parceners be, and before any partition made the one hath issue and dieth, that which to him belongeth shall descend to his issue. And if such parcener die without issue, that which belongs to her shall descend to her co-heirs [Sect. 286], so as they shall have this by descent, and not by survivor, as joint-tenants shall have, &c.

NOTE.—As the 3 & 4 Will. 4, c. 106, s. 2, has enacted that descent is to be traced from the first purchaser, *i. e.*, from the most remote ancestor who can be proved to have inherited the land (see Sect. 2, note), it has been contended that Littleton's proposition that where one of these co-parceners dies leaving issue, such issue should take that which belonged to the parent, is no longer correct, and that in such case the surviving sisters of the parcener will take with the issue of their deceased sister, for the descent of the parcener's share is, say they, to be traced back, according to the Act, from the ancestor of the parceners, which lets in the sisters of the deceased parceners. This has been most strenuously insisted on, but though very specious it is not a correct conclusion. There evidently has always been a peculiar rule applicable to co-parceners, by which, in the words of Littleton, "that which belongeth to a deceased co-parcener, descendeth to her issue;" and it is to be observed that if there were anything in the point taken by the above parties it would have always been applicable to parceners in tail; for the issue in tail always took *per formam doni*, as well as by descent (Com. Dig. tit. "Estates," B. 7; *ante*, Sects. 6, 52, notes), *i. e.*, the descent was traced from the donee in tail; and the late Act makes the purchaser to stand in the place of the donee in tail, and thus, notwithstanding the Act, the issue of the deceased parcener will take the whole of the parent's share to the exclusion of the aunts. This has been so decided in the case of *Cooper v. France* (14 Jurist, 214), but the grounds of the decision are hardly satisfactory, though no doubt the point really decided, namely, that "when a co-parcener dies intestate, leaving a son, the *whole* of her share descends on her son," is quite correct.

SECT. CCLXXXI. *Survivorship takes place in joint-owner-*

ship of chattels.—And as survivorship holds place between joint-tenants, in the same manner it holdeth place between them which have joint estate or possession with another of a chattel, real or personal. As if a lease of lands or tenements be made to many for term of years, he which survives of the lessees shall have the tenements to him alone during the term by force of the same lease. And if a horse, or any other chattel, personal, be given to many, he which surviveth shall alone have the horse, &c.

NOTE.—A trust of a term in joint-tenancy will go to the survivor in equity as well as in law. (Cruise's Dig. tit. 18, ch. 1, s. 23; *Rex v. Williams*, Bunbury, 342.) In favour of commerce the doctrine of survivorship of joint property does not take place among partners; for stock on a farm, although occupied jointly, or stock of a partnership in trade, independently of any express contract to that effect, is always considered as common, and not as joint property; and therefore in these instances there is no survivorship, but the interest of the party dying vests in his executor not only in equity, but also at law. (2 Black. Com. 399; Comyns' Dig. tit. "Merchant" (D.); Co. Litt. 182, and note (4) by Hargrave; *Buckley v. Barber*, 15 Jurist, 63, which last case should be carefully read.) At law, however, the *remedy* survives. (See Sect. 282.)

SECT. CCLXXXII. *Joint debts go to survivor.*—In the same manner it is of debts and duties, &c., for if an obligation be made to many for one debt, he which surviveth shall have the whole debt or duty. And so it is of other covenants and contracts, &c.

SECT. CCLXXXIII. *There may be joint tenants for life, with several inheritances.*—Also, there may be some joint-tenants which may have a joint estate, and be joint-tenants for term of their lives, and yet have several inheritances. As if lands be given to two men and to the heirs of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have several inheritances; for if one of the donees hath issue and die, the other which surviveth shall have the whole by the survivor for term of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moiety, and the issue of the other shall have the other moiety of the land, and they shall hold the land between them in common, and they are not joint-tenants, but are tenants in common. And the cause why such donees in such case have a joint estate for term of their lives is, for that at the

beginning the lands were given to them two, which words, without more saying, make a joint estate to them for term of their lives. For if a man will let land to another by deed, or [formerly, Sect. 59, note] without deed, not making mention what estate he shall have, and of this make livery of seisin, in this case the lessee hath an estate for term of his life [Sect. 56, note]; and so, in as much as the lands were given to them, they have a joint estate for term of their lives. And the reason why they shall have several inheritances is this, in as much as they cannot by any possibility have an heir between them engendered as a man and woman may have, &c., the law wills that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift, and this is to the heirs which the one shall beget of his body by any [Sect. 14] of his wives, and to the heirs which the other shall beget of his body by any of his wives, &c., so as it behoveth, by necessity of reason, that they have several inheritances. And in this case if the one donee or the issue of one of the donees, after the death of the donees, die, so that he hath no issue alive of his body begotten, then the donor or his heir may enter into the moiety as in his reversion, &c. [Sect. 19], although the other donee hath issue alive, &c. And the reason is, for as much as the inheritances be several, &c., the reversion of them in law is several, &c., and the survivor of the issue of the other shall hold no place to have the whole.

NOTE.—Upon Littleton's authority, it has lately been decided, that on a devise to the testator's daughters J and S, and their heirs, and for want of such issue, then to A and her heirs for ever, J and S took as joint-tenants for life, with several inheritances in tail, and with cross-remainders in tail. (*Edwards v. Champion*, 3 De G. Macn. and G. 202; S. C. 21 Law Tim. 293.)

SECT. CCLXXXIV. *Same subject continued.*—And as it is said of males, in the same manner it is where lands are given to two females, and to the heirs of their two bodies engendered.

NOTE.—The reason of the above is that there can be no joint tenancy in tail, unless the donees be male and female, and be such as may lawfully intermarry. (Co. Litt. 184 a; Dyer, 326; Watk. Princ. Convey. 140, note a.) The inheritances, in the case put by Littleton, are in tail general (Sect. 14), and are remainders.

SECT. CCLXXXV. *On gift to two for life, and the heirs, or heirs of the body, of one of them, it is a joint-estate for life.*—Also, if lands be given to two and to the heirs of one of them, this is

a good jointure, and the one hath a freehold and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life. In the same manner it is, where tenements be given to two, and the heirs of the body of one of them engendered, the one hath a freehold, and the other a fee tail, &c.

NOTE.—During the continuance of the freehold, the remainder in fee, being peculiarly circumstanced, is not grantable separately from the life estate. (Burt. pl. 749, n.) An estate of freehold or inheritance cannot stand in jointure with a *term for years*. Therefore, if lands be given to A and B, *habendum* to the one for life, and to the other for years, they are not joint-tenants. (Co. Litt. 188 a; Comyns' Dig. tit. "Estates," K. 2.)

SECT. CCLXXXVI. *Grant of rent-charge by one joint-tenant is effectual during his life, but will not bind survivor—It is otherwise of parceners.*—Also, if two joint-tenants be seised of an estate in fee simple, and the one grants a rent-charge [Sect. 217] by his deed to another out of that which belongeth to him, in this case during the life of the grantor the rent-charge is effectual; but after his decease the grant of the rent-charge is void, as to charge the land, for he which hath the land by survivor shall hold the whole land discharged [Sect. 289]. And the cause is, for that he which surviveth claimeth and hath the land by the survivor, and hath not, nor can claim any thing by descent from his companion, &c. [Sect. 280.] But otherwise it is of parceners, for if there be two parceners of tenements in fee simple, and before any partition made, the one chargeth that which to her belongeth by her deed with a rent-charge, &c., and after dieth without issue, by which that which belongeth to her descends to the other parcener [Sect. 280], in this case the other parcener shall hold the land charged, &c., because she came to this moiety by descent, as heir, &c.

SECT. CCLXXXVII. *Joint-tenant cannot devise his joint-estate, but a coparcener may.*—Also, if there be two joint-tenants of land in fee simple within a borough, where lands and tenements are devisable by testament [see Note to Sect. 167], and if one of the said two joint-tenants deviseth that which to him belongeth by his testament, &c., and dieth, this devise is void. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently cometh by the law to his companion which surviveth, by the survivor [Sect. 280], the which he doth not claim, nor hath any thing in the land by the devisor, but in his own right by

the survivor according to the course of law, &c., and for this cause such devise is void. But otherwise it is of parceners seised of tenements devisable in like case of devise, &c., *causâ quâ suprâ*. [Sect. 286, *ad fin.*]

SECT. CCLXXXVIII. *Joint-tenant is seised per my et per tout*.—Also, it is commonly said, that every joint-tenant is seised of the land which he holdeth jointly *per my et per tout*; and this is as much as to say, as he is seised by every parcel and by the whole, &c., and this is true, for in every parcel, and by every parcel, and by all the lands and tenements, he is jointly seised with his companion.

NOTE.—Mr. Serjt. Stephen (1 Com. 315, note) says, that the expression "*per my et per tout*" seems properly to import that the joint-tenants are all jointly seised of the whole, with a right to transfer in equal shares. For the purposes of alienation joint-tenants are not seised of a moiety *separatim*. Thus, if A and B are joint-tenants in fee of 100 acres, A may convey an undivided moiety of the 100 acres, but not the entirety of 50, as and for the moiety of the 100 acres: if he affects so to convey 50 acres, an undivided moiety only of such 50 acres will pass. (Watk. Convey. 157, 8th edit.) The expression "*per my et per tout*" in the above section has been the subject of much diversity of opinion. In a note to 7 Com. Ben. Rep. 455 (see also 4 Man. and Gran. 573, note; 7 *Id.* 172, note), it is said that the word "my" signifies "not in the least," and has nothing to do with a moiety; and that M. Houdard's paraphrase of Littleton, "each joint-tenant has not the property of anything [*n'a la propriété de rien*], and is proprietor of the whole," is quite correct, meaning that each joint-tenant holds the whole conjointly, and holds *nothing* in severalty: which is conformable to Bracton, as quoted, 2 Black. 182, note (i), "*Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.*" And with this agrees Lord Coke's description, "*Et sic totum tenet et nihil tenet, scilicet, totum conjunctim et nihil per se separatim.*" In the same note it is said that the expression "*per my et per tout*," in the above sense, applies also to tenants in common and co-parceners. This is thrown out for the reader's consideration.

SECT. CCLXXXIX. *A lease by one joint-tenant will bind the survivor*.—Also, if two joint-tenants be seised of certain lands in fee simple, and the one letteth that which to him belongeth to a stranger for a term of forty years, and dieth before the term beginneth, or within the term, in this case after his

decease the lessee may enter and occupy the moiety let unto him during the term, &c., although the lessee had never the possession thereof in the life of the lessor, by force of the same lease, &c. [Sect. 59.] And the diversity between the case of a grant of a rent-charge aforesaid [Sect. 286] and this case, is this. For in the grant of a rent-charge by a joint-tenant, &c., the tenements remain always as they were before, without this, that any hath any right to have any parcel of the tenements but they themselves, and the tenements are in the same plight as they were before the charge, &c. But where a lease is made by a joint-tenant to another for term of years, &c., presently by force of the lease the lessee hath right in the same land (*videlicet*) of all that which to the lessor belongeth, and to have this by force of the same lease during his term. And this is the diversity.

NOTE.—A lease for years by one joint-tenant to a stranger works neither a severance nor a suspension, but it passes only a moiety of the estate, though it purport to embrace the whole. (2 Prest. Abstr. 93.)

SECT. CCXC. *Joint-tenants may make partition.*—Also, joint-tenants (if they will) may make partition between them, and the partition is good enough; but they should not [*formerly*] have been compelled to do this by the law; but if they would make partition of their own will and agreement, the partition should have stood in force.

NOTE.—Joint-tenants were not compellable by the common law to make partition, but if they consented to make partition it was good; but then it was necessary that such partition should be made by deed (Co. Litt. 169 a, 187 a), unless in the case of joint-tenant for years. (6 Jarm. Convey. by Sweet, 587.) By the 8 & 9 Vict. c. 106, s. 3, a partition (except of copyholds) must, at law, be by deed.

SECT. CCXCI. *On grant to husband and wife and a third person, the husband and wife have but a moiety between them.*—Also, if a joint estate be made of land to a husband and wife and a third person, in this case the husband and wife have in law in their right but the moiety, and the third person shall have as much as the husband and wife, viz., the other moiety, &c. [Sect. 305.] And the cause is, for that the husband and wife are but one person in law [Sect. 168], and are in like case as if an estate be made to two joint-tenants, where the one hath, by force of the jointure, the one moiety in law, and the other the other moiety, &c. In the same manner it is where an estate is made to the husband and wife and to two other men; in this

case the husband and wife have but the third part, and the other two men the other two parts, &c., *causâ quâ suprà*.

NOTE.—The rule laid down in this section has been acted on and acknowledged in very many cases, beginning with *Back v. Andrew* (2 Vernon, 120), and ending with *Re Wylde* (16 Jurist, 1029). By this last case and the authorities referred to in it, it is settled that the reasons above alleged for giving a moiety only to husband and wife in case of a joint-tenancy apply equally to a tenancy in common; and further, that the same construction as applies to lands will also apply to *personal* estate.

TENANTS IN COMMON.

SECT. CCXCII. *Tenants in common described*.—Tenants in common are they which have lands or tenements in fee simple, fee tail, or for term of life, &c., and they have such lands or tenements by several titles [Sect. 311], and not by a joint title, and none of them know of this his several, but they ought by the law to occupy these lands or tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by several titles, and not by one joint title, and their occupation and possession shall be by law between them in common, they are called tenants in common. As if a man infeoff two joint-tenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other joint-tenant are tenants in common [Sect. 44, note]; because they are in, in such tenements, by several titles, for the alienee cometh to the moiety by the feoffment of one of the joint-tenants, and the other joint-tenant hath the other moiety by force of the first feoffment made to him and to his companion, &c., and so they are in by several titles, that is to say, by several feoffments, &c.

SECT. CCXCIV. *If one of three joint-tenants alien, he is a tenant in common; but the two remain joint-tenants to each other*.—Also, if three joint-tenants [*in fee*] be, and one of them alien that which to him belongeth to another man in fee, in this case the alienee is tenant in common with the other two joint-tenants: but yet the other two joint-tenants are seised of the two parts which remain, jointly, and of these two parts the survivor between them two holdeth place, &c. [Sect. 304.]

SECT. CCXCV. *On separate gifts in tail by joint-tenants, the donees are tenants in common*.—Also, if there be two joint-

tenants in fee, and the one giveth that which to him belongeth to another in tail, and the other giveth that which to him belongs to another in tail, the donees are tenants in common, &c.

SECT. CCXCVIII. *On gift to two, to hold in moieties, they are tenants in common.*—Also, if lands be given to two, to have and to hold, *scil.* the one moiety to the one and to his heirs, and the other moiety to the other and to his heirs, they are tenants in common.

NOTE.—The premises being joint, it might be thought that the habendum could not sever the interest in the lands, but in reality the interest given in the premises of the deed would be joint *primâ facie only* and impliedly, and the habendum is not repugnant thereto, but merely explains the manner of possessing the estate, and makes no division of that undivided possession which was given by the premises; and joint-tenants and tenants in common have both an undivided possession or right of occupation. (4 Bacon's Abr. tit. "Joint-tenants," F., p. 464, 7th edit.)

SECT. CCXCIX. *On a feoffment, by one solely seised, of a moiety, the feoffor and feoffee are tenants in common.*—Also, if a man seised of certain lands, enfeoff another of the moiety of the same land without any speech of assignment or limitation of the same moiety in severalty at the time of the feoffment, then the feoffee and the feoffor shall hold their parts of the land in common.

SECT. CCC. *If two joint-tenants in fee severally lease for life to two, the latter are tenants in common.*—And it is to be understood, that in the same manner as is aforesaid of tenants in common, of lands or tenements in fee simple, or in fee tail, in the same manner may it be of tenants for term of life. As if two joint-tenants be in fee, and the one letteth to one man that which to him belongeth for term of life, and the other joint-tenant letteth that which to him belongeth to another for term of life, &c., the said two lessees are tenants in common for their lives, &c. [Sect. 283.]

SECT. CCCI. *If one of two joint-tenants for life assigns his estate, the assignee and the other tenant for life hold as tenants in common.*—Also, if a man let lands to two men for term of their lives, and the one grants all his estate of that which belongeth to him to another, then the other tenant for term of life, and he to whom the grant is made, are tenants in common during the time that both the lessees be alive.

SECT. CCCIV. *If one of three joint-tenants release to one of his co-tenants, that part is held in common with the third tenant.*—And, if three joint-tenants be, and the one release by his deed to one of his companions all the right which he hath in the land, then hath he to whom the release is made, the third part of the lands by force of the said release, and he and his companion shall hold the other two parts in jointure. [Sect. 294.] And as to the third part which he hath by force of the release, he holdeth that third part with himself and his companion in common.

NOTE.—The proper mode of conveyance from one joint-tenant to another, and the most effectual to sever the joint-tenancy, either of the whole or part of the *immediate freehold* of lands, is a *release* (2 Saund. 97); livery, or what is equivalent to it (*i. e.* a lease and release), or a grant since the 8 & 9 Vict. c. 106, not being necessary, because each joint-tenant has a seisin in every part and the whole *per my et per tout*. (Sect. 288; Hawk. Abr. Co. Litt. 271, 7th edit.) But as tenants in common have only a privity between them in possession, and not in estate (Co. Litt. 169 a), they cannot release to each other the immediate freehold of lands, without previously creating an estate capable of enlargement by release, as by a bargain and sale for years. (Co. Litt. 200 b; Bacon's Abr. tit. "Joint-tenants;" 6 Jarman's Convey. by Sweet, 588, 589.) They may now, of course, *grant* to each other. (Sect. 59, note.)

SECT. CCCV. *How releases enure. To pass the estate.*—And it is to be observed, that sometimes a deed of release shall take effect, and enure to put the estate of him which makes the release to him to whom the release is made, as in the case aforesaid, and also, as if a joint estate be made to the husband and wife, and to a third person [Sect. 291], and the third person release all his right which he hath to the husband, then hath the husband the moiety which the third had, and the wife hath nothing of this. And if in such case the third release to the wife, not naming the husband in the release, then hath the wife the moiety which the third had, &c., and the husband hath nothing of this, but in right of his wife, because that in this case the release shall enure to make an estate to him to whom the release is made, of all that which belongeth to him which maketh the release, &c.

SECT. CCCIX. *Alienee of coparcener is tenant in common with other parcener.*—Also, if two parceners be, and the one alieneth that which to her belongeth to another, then the other parcener and the alienee are tenants in common. [Sect. 243, note.]

SECT. CCCXI. *Tenants in common may have in some instances a joint action, and in other instances several actions.*—Also, in some cases tenants in common ought to have of their possession several actions, and in some cases they shall join in one action. For if two tenants in common be, and they be disseised, they must have had [formerly] two assizes, and not one assize; for each of them ought to have had one assize of his moiety, &c. And the reason is, for that the tenants in common were seised, &c., by several titles. [Sect. 292.] But otherwise it is of joint-tenants; for if twenty joint-tenants be, and they be disseised, they should have had in all their names but one assize, because they have but one joint title. [Sect. 304, note.]

NOTE.—The writ of assize is abolished with other real actions, by 3 & 4 Will. 4, c. 27, s. 36. The remedy now is by ejectment. As to ejectments by joint-tenants and tenants in common, see *Doe v. Hamilton* (14 Jurist, 546), where the Court were divided in opinion.

SECT. CCCXV. *In what actions tenants in common must join.*—Also, as to actions personal, tenants in common may have such action personal jointly in all their names, as of trespass, or of offences which concern their tenements in common, as for breaking their houses, breaking their closes, feeding, wasting, and trampling down their grass, cutting their woods, for fishing in their piscary, and such like. In this case tenants in common shall have one action jointly, and shall recover jointly their damages, because the action is in the personalty, and not in the realty, &c.

SECT. CCCXVI. *Joint action of debt by tenants in common for rent on lease by them.*—Also, if two tenants in common make a lease of their tenements to another for term of years, rendering to them a certain rent yearly during the term, if the rent be behind, &c., the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty.

SECT. CCCXVII. *In avowry, tenants in common must sever.*—But in an avowry for the said rent, they ought to sever, for this is in the realty.

SECT. CCCXVIII. *Tenants in common may make partition.*—Also, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law; but if they make partition between themselves by

their agreement and consent [Note to Sect. 290], such partition is good enough, as is adjudged in the Book of Assises.

NOTE.—By 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, tenants in common are compellable to make partition, which is enforced in equity. (See Co. Litt. 169 a [s]; Booth on Real Actions, 244.) The estate of a tenant in common is not essentially altered by a partition, which will not even operate to revoke a devise contained in the will of a tenant in common made previously to the partition. (Reynard v. Spence, 5 Jur. 481.) A partition may be made though one of the tenants in common has leased his part. (*Ibid.*)

SECT. CCCXIX. *Tenants in common may be of chattels real and personal.*—Also, as there be tenants in common of lands and tenements, &c., as aforesaid, in the same manner there be of chattels real and personal. As if a lease be made of certain lands to two men for term of twenty years, and when they be of this possessed, the one of the lessees grant that which to him belongeth to another during the term, then he to whom the grant is made and the other shall hold and occupy in common.

SECT. CCCXXI. *If one of two joint owners of chattels grant his share to a third person, the latter and the other joint owner shall hold in common, and then there is no survivorship.*—In the same manner it is of chattels personal. As if two have jointly, by gift or by buying, a horse or an ox, &c., and the one grant that which to him belongs of the same horse or ox to another, the grantee, and the other which did not grant, shall have and possess such chattels personal in common. And in such cases, where divers persons have chattels real or personal in common, and by divers titles, if the one of them dieth, the others which survive shall not have this as survivor, but the executors of him which dieth shall hold and occupy this with them which survive, as their testator did or ought to have done in his lifetime, &c., because that their titles and rights in this were several, &c.

SECT. CCCXXII. *One tenant in common for years may have an ejectment against his co-tenant for ousting him.*—Also, in the case aforesaid, as if two have an estate in common for term of years, &c., the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moiety, &c.

NOTE.—It has been decided that pulling down the houses and forming a railway on the land, at the instance of one of

several tenants in common, is such an occupation as amounts to an actual ouster, and entitles the dispossessed tenant in common to maintain ejectment. (*Doe v. Horn*, 5 Mees. and Wels. 564.)

SECT. CCCXXIII. *One tenant in common cannot, in general, maintain trespass against his co-tenant.*—In the same manner it is where two hold the wardship of lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted might [formerly] have had a writ of *ejectment de gard* of the moiety, &c., because that these things are chattels real, and may be apportioned and severed, &c., but no action of trespass (*videlicet*), *Quare clausum suum fregit, et herbam suam, &c., conculcavit, et consumpsit, &c., et hujusmodi actiones, &c.* [but see the Note] the one cannot have against the other, for that each of them may enter and occupy in common, &c., *per my et per tout*, the lands and tenements which they hold in common. But if two be possessed of chattels personal in common by divers titles, as of a horse, an ox, or a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong to occupy in common, &c., when he can see his time, &c. In the same manner it is of chattels real, which cannot be severed, as in the case aforesaid, where two be possessed of the wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action by the law, but to take the infant out of the possession of the other when he sees his time.

NOTE.—Notwithstanding Littleton's express assertion, it has been lately decided that trespass *quare clausum fregit* can be maintained by one tenant in common against his co-tenant for an actual expulsion from a messuage of which they are tenants in common. (*Murray v. Hall*, 7 Com. Ben. Rep. 413.) This is certainly going beyond the previous authorities, which have indeed decided that an action of trespass for mesne profits may be brought by one tenant in common, who has recovered in ejectment against his companion. (*Goodtitle v. Tombs*, 3 Wilson, 118.) Also, that if one tenant in common destroy the chattels held in common, the other tenant in common may maintain trespass or trover against him. (*Selw. Nisi Prius*, tit. "Trover;" *Clayton v. Corby*, 5 Qu. Ben. Rep. 415; *Wilkinson v. Haygarth*, 11 Jur. 104.) It is not settled whether an action of trover can be maintained by one tenant in common against his co-tenant, for a sale of their common property, but the general opinion is that such

an action is maintainable. (See *Mayhew v. Herrick*, 13 Jur. 1080.) As to the latter portion of the above section, see *Gilbert v. Schwenck* (9 Jurist, 693), where it was held that joint testamentary guardians are like trustees, and that, therefore, where one of two testamentary guardians brought an action of trespass against his companion, alleging that the infant was his servant, and that the defendant forcibly took him out of his possession, *per quod servitium amisit*, the action was sustainable.

ESTATES UPON CONDITION.

SECT. CCCXXV. *Conditions are in deed, or in law*—*Entry for non-payment of rent*—Estates which men have in lands or tenements upon condition, are of two sorts, viz., either they have estate upon condition in deed, or upon condition in law, &c. Upon condition in deed is, as if a man by deed indented enfeoffs another in fee simple [*or leases for life or for years*, Sect. 326], reserving to him and his heirs yearly a certain rent, payable at one feast or divers feasts *per annum*, on condition that if the rent be behind, &c., that it shall be lawful for the feoffor and his heirs into the same lands or tenements to enter, &c. And if it happen that the rent be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, &c., that then it shall be lawful to the feoffor and his heirs to enter, &c. In these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them in his former estate [Sect. 347, *ad fin.*], to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the estate of the feoffee is defeasible, if the condition be not performed, &c.

NOTE.—Littleton puts the case of a feoffment in fee rendering rent, with a clause of re-entry, if the rent be unpaid, in which case, it is said, the feoffor or his heirs may enter for the condition broken (and see Sect. 341); and this is so, though, as is evident, the feoffor has no reversion; for in such case the lands are not, nor, as before stated (Sect. 216, and note), can they, since the statute of *Quia Emptores*, be holden of him, but must be holden of the superior lord of the fee. Littleton adds, that the party making the entry shall have and hold the land in his former estate, which although true as a general rule, yet fails in some cases, as shown by Lord Coke in his Comment. Upon the conjoint authority of Littleton

and Coke, it has been decided that where a lessee assigns over the whole of his term, expressly reserving to himself a right of re-entry on the breach of a condition, he may enter for the condition broken, although he has no reversion. (*Doe dem, Freeman v. Bateman*, 2 Barn. & Ald. 168.)

It must be borne in mind that in all cases of a subject, where an estate is upon condition to be void for non-payment of rent, the condition will not be broken, and there will consequently be no right of re-entry, if the rent be not demanded. The demand must be of the precise sum due, and on the last day appointed for payment, a reasonable time before sunset. (*Comyns' Dig. tit. "Rent," D. 3—7; Co. Litt. 201 b; Doe v. Wandlass*, 7 Term Rep. 117.) The parties may, however, agree that no demand shall be made, and then it is not necessary. (*Doe v. Masters*, 2 Barn. and Cres. 490; 5 Coke's Rep. 40.) And as leases may be made to give a re-entry on breach of any of the covenants, which also includes the covenant for payment of rent, it should seem that there might be a re-entry for default in payment of the rent without any demand, more especially as it has lately been decided that where a lessee covenants by deed to pay rent at the time and in the manner reserved by the lease, and no particular place of payment is named, it is no defence to an action on the covenant to plead that the lessee was upon the land demised on the day the rent became due, with the money, ready to pay the lessor, but that the lessor was not there to receive the same, it being the duty of the lessee to seek out the lessor and tender the money to him personally, at whatever place the lessor may then be within the realm. (*Haldane v. Johnson*, 22 Law Tim. Rep. 11; see Sects. 340, 341.) It is to be remarked, however, that all the text-books and authorities consider a demand necessary, but they do not advert to the distinction as to the re-entry being for a breach of the *covenant* to pay, and not of the condition. The reader will bear this in mind. By the 15 & 16 Vict. c. 76, ss. 210—212 (re-enacting 4 Geo. 2, c. 28), a landlord to whom half a year's rent is due, and no sufficient distress to answer the same is to be found on the premises, may re-enter (*i. e.*, bring ejectment, for that is the mode in which a re-entry is legally enforceable), without showing any demand of the rent. (See *Doe v. Bowditch*, 8 Qu. Ben. Rep. 973; S. C. 10 Jur. 638.)

SECT. CCCXXVI. *Entry till satisfaction on gifts in tail, leases, &c.*—In the same manner it is if lands be given in tail, or let for term of life or for years, upon condition, &c.

SECT. CCCXXVII. *Entry on breach of condition may be till the feoffor be satisfied, &c.*—But where a feoffment is made of certain lands reserving a certain rent, &c., upon such condition, that if the rent be behind, that it shall be lawful for the feoffor and his heirs to enter, and to hold the land until he be satisfied or paid the rent behind, &c., in this case, if the rent be behind, and the feoffor or his heirs enter, the feoffee is not altogether excluded from this, but the feoffor shall have and hold the land, and thereof take the profits, until he be satisfied of the rent behind; and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. For in this case the feoffor shall have the land, but in manner as for a distress, until he be satisfied of the rent, &c., though he take the profits in the mean time to his own use, &c.

NOTE.—Formerly nice distinctions were taken in the construction of such conditions, and it was sometimes held that the profits should not go in satisfaction of the rents, but should be as a penalty (Comyns' Dig. tit. "Condition," O. 3; Co. Litt. 203); but this distinction was never admitted in equity, which will always make the lessor account to the lessee for the profits of the estate during the time of his being in possession. (Co. Litt. 203 a, n. 3; 10 Jur. pt. 2, p. 310.) Such a right of re-entry is not one within the 15 & 16 Vict. c. 76, ss. 210—212 (mentioned in Note to Sect. 326), and therefore a legal demand of the rent (unless dispensed with) must be shown. (Doe v. Bowditch, 10 Jur. 638.)

SECT. CCCXXVIII. *The words "upon condition" make an estate upon condition.*—Also, divers words (amongst others) there be, which by virtue of themselves make estates upon condition; such are the words ("*sub conditione*") : as if A. enfeoff B. of certain land, to have and to hold to the said B. and his heirs, upon condition that the said B. and his heirs do pay or cause to be paid to the aforesaid A. and his heirs yearly such a rent, &c. In this case, without any more saying, the feoffee hath an estate upon condition.

SECT. CCCXXIX. *The words "provided always," and "so that," make an estate upon condition.*—Also, if the words were such, "Provided always," that the aforesaid B. do pay or cause to be paid to the aforesaid A. such a rent, &c.; or these, "so that," the said B. do pay or cause to be paid to the said A. such a rent, &c.; in these cases, without more saying, the feoffee hath but an estate upon condition; so as, if he doth not perform the condition, the feoffor and his heirs may enter, &c.

SECT. CCCXXX. *There are other words of condition : as, "if it happen," if followed by power of entry.*—Also, there be other words in a deed which cause the tenements to be conditional. As if upon such feoffment a rent be reserved to the feoffor, &c., and afterwards these words are put into the deed, "That if it happen that the aforesaid rent be behind in part or in all, that then it shall be lawful for the feoffor and his heirs to enter, &c." This is a deed upon condition.

SECT. CCCXXXI. *The words "if it happen" require to be followed by a power of entry, but the other words of condition do not.*—But there is a diversity between these words "*si contingat*," &c., and the words next aforesaid, &c. For these words "*si contingat*," &c., are naught worth to such a condition, unless it has these words following, "That it shall be lawful for the feoffor and his heirs to enter," &c. But in the cases aforesaid, it is not necessary by the law to put such clause, *scilicet*, "that the feoffor and his heirs may enter," &c., because they may do this by force of the words aforesaid, for that they contain in themselves a condition, *scilicet*, that the feoffor and his heirs may enter, &c.; yet it is commonly used in all such cases aforesaid, to put the clause in the deed, *scilicet*, "if the rent be behind, &c., that it shall be lawful to the feoffor and his heirs to enter," &c. And this is well done, for this intent, to declare and express to the common people, who are not learned in the law, of the manner and condition of the feoffment, &c. As if a man seised of land, letteth the same land to another by deed indented for term of years, rendering to him a certain rent, it is used to be put into the deed, that if the rent be behind at the day of payment, or by the space of a week or a month, &c., that then it shall be lawful to the lessor to distrain, &c., yet the lessor may distrain of common right for the rent behind, &c., though such words were not put into the deed, &c.

SECT. CCCXXXII. *The term "mortgage" explained.*—Item, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., £40 of money, that then the feoffor may re-enter, &c., in this case the feoffee is called tenant in mortgage, which is as much as to say in French as mortgage, and in Latin *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is [at law] taken from him for ever, and so dead to him upon

condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

NOTE.—Although it is true that *at law* the land is forfeited for non-payment of the mortgage money at the time agreed on (Co. Litt. 210; 5 Coke's Rep. 96, 115), yet in *equity*, the mortgagor is still looked on as the owner, and his interest is styled an equity of redemption. The mortgagee is considered as holding the lands only as a pledge or security for payment of the money. A mortgage in fee is considered in equity as personal estate, though the legal estate vests in the heir in point of law. (Co. Litt. 205 a, n. 1.) Littleton speaks of a mortgage by a feoffment, but since his time it has become usual to effect the security by a grant, or by demising the land for a long term of years; and instead of having a condition for making void the conveyance or demise on payment of the debt, an agreement is inserted, that the mortgagee shall reconvey the estate on payment at the appointed time. (5 Jarman's Convey. by Sweet, 80.) Sometimes, indeed, the mortgage deed provides, that on payment of the debt on the prescribed day the deed shall be void; and in such case, if the money is paid or tendered on the day, the estate ceases, and no assurance by the mortgagee is necessary.

SECT. CCCXXXIII. *Mortgage in tail, for life or years.*—Also, as a man may make a feoffment in fee in mortgage, so a man may make a gift in tail in mortgage, and a lease for term of life, or for term of years in mortgage. And all such tenants are called tenants in mortgage, according to the estates which they have in the land, &c.

SECT. CCCXXXIV. *Payment by heir of mortgagor at the day is good, though heir not mentioned in mortgage deed. But a stranger cannot make a valid payment to save the condition.*—Also, if a feoffment be made in mortgage upon condition, that the feoffor shall pay such a sum at such a day, &c., as is between them by their deed indented [Sect. 58, note], agreed and limited, although the feoffor dieth before the day of payment, &c., yet if the heir of the feoffor pay the same sum of money at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heir enter into the land; and yet the condition is, that if the feoffor shall pay such a sum at such a day, &c., not making mention in the condition of any payment to be made by his heir, but for that the heir hath interest of right in the condition, &c., and the intent was but that the money should be paid at the day assessed, &c., and

the feoffee hath no more loss if it be paid by the heir, than if it were paid by the father, &c.; therefore if the heir pay the money, or tender the money at the day limited, &c., and the other refuse it, he may enter, &c. But if a stranger of his own head, who hath not any interest, &c., will tender the aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.

NOTE.—As in Littleton's time, mortgages were made by feoffment with livery, an immediate freehold estate was vested in the mortgagee. But as feoffments are not now in use in mortgages (Note to Sect. 332), it is customary to insert a clause in the deed that until default is made in payment of the mortgage money, and interest on the day named (usually six months after the execution of the mortgage), the mortgagor shall continue in possession of the mortgaged premises. This was formerly (see *Wilkinson v. Hall*, 4 Scott, 301; 3 Bing. N. C. 508) held to be a re-demise, and it should seem correctly so. (See *Sheppard's Touch.* p. 272, 8th edit.; *Bacon's Abr.* tit. "Leases," K.) But it has since been held in different cases to be a mere covenant, and *not* a re-demise. (*Doe v. Lightfoot*, 8 Mees. and W. 553; S. C. 5 Jurist, 996; *Doe v. Day*; 2 Qu. Ben. Rep. 147; S. C. 12 Law Journ. N. S., Q. B. 86; *Doe v. Lightfoot*, 8 Mees. and Wels. 553; S. C. 5 Jurist, 996. See, however, *Wheeler v. Montefiore*, 1 Gale and Dav. 493; S. C. 6 Jur. 299, and *Doe v. Goldwin*, 2 Qu. Ben. Rep. 143. See, however, *Doe v. Davis* (7 Exch. Rep. 89; S. C. 16 Jur. 44), where, however, there was express mention of a tenancy at will. We may observe that this case expressly recognised what is stated in note to Sect. 72, that a tenancy at will may be coupled with a yearly rent. If payment be made at the day, or at any future time before the mortgagee has taken possession, no re-entry is required, as was necessary on a mortgage by feoffment.

SECT. CCCXXXIX. *The mortgage money belongs to the executor of mortgagee.*—Also, if the feoffee in mortgage before the day of payment which should be made to him, makes his executors and die, and his heir entereth into the land as he ought, &c., it seemeth in this case that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee, because the money at the beginning trenched to the feoffee in manner as a duty, and it shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other duty, and therefore the payment shall not be made to the heir, as it seemeth, but the words of the condition may be such, as the payment shall

be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day, &c., there, after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at the day appointed, &c.

NOTE.—It is now a clear rule that the mortgage money shall be deemed part of the *personal* estate, and consequently belongs to the executor or administrator, unless a clear intention appears or has been expressed to the contrary by the mortgagee. Indeed, where the mortgage money is to be paid to the executor *or* the heir, the mortgagor may, if he pay on the day, pay either the executor *or* the heir; but if he pay the latter, it will still belong to the executor, for whom the heir will be a trustee. (2 Powell on Mortg. by Coventry, 662, 663, 688; 2 Story's Eq. Jurispr. 255, note, 2nd edit.)

SECT. CCCXL. *The mortgage money must be tendered to the mortgagee if in the kingdom, and tender on the land not sufficient.*—Also, upon such case of feoffment in mortgage, a question hath been demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And some have said, upon the land so holden in mortgage, because the condition is depending upon the land. And they have said that if the feoffor be upon the land, there ready to pay the money to the feoffee at the day set, and the feoffee be not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seek the feoffee if he be then in any other place within the realm of England. As if a man be bound in an obligation of £20 upon condition indorsed upon the same obligation, that if he pay to him to whom the obligation is made at such a day £10, then the obligation of £20 shall lose its force, and be holden for nothing; in this case it behoveth him that made the obligation to seek him to whom the obligation is made, if he be in England, and at the day set to tender unto him the said £10, otherwise he shall forfeit the sum of £20, comprised within the obligation, &c. And so it seemeth in the other case, &c. And albeit that some have said that the condition is depending upon the land, yet this proves not that the making of the condition to be performed ought to be made upon the land, &c., no more than if the condition were that the feoffor at such a day shall do some special corporal service to the feoffee, not naming the place where such corporal service shall be done. In this case the feoffor ought to do such

corporal service at the day limited to the feoffee, in what place soever of England that the feoffee be, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seems to them that it shall be more properly said that the estate of the land is depending upon the condition, than to say that the condition is depending upon the land, &c. *Sed quære, &c.*

NOTE.—The mortgage money being a sum in gross (Co. Litt. 210 b; 2 Equity Cas. Abr. 603), and collateral to the title of the land, the mortgagor must tender it to the *person* of the mortgagee, and it is not sufficient to tender it upon the land except where the mortgagee is out of the kingdom. (Co. Litt. 210 b; Note to Sect. 326.) If a time and place be specified in the deed, the tender must be made accordingly, and a tender at the mortgagee's house, where no place specified, has been held good, though he was not at home. (Co. Litt. 211 b; 212 a; Gyles v. Hall, 2 P. Williams, 378; Manning v. Burgess, 1 Chanc. Cas. 29; Powell on Mortg. by Coventry, pp. 939, 940, 5th edit.)

SECT. CCCXLI. *Tender of rent upon the land is sufficient.*—But if a feoffment in fee be made, reserving to the feoffor a yearly rent, and for default of payment a re-entry, &c. [Note to Sect. 325], in this case the tenant needeth not to tender the rent, when it is behind, but upon the land; because this is a rent issuing out of the land, which is a rent-seck [Sect. 217]. For if the feoffor be seised once of this rent and after he cometh upon the land, &c., and the rent is denied him, he might [formerly] have had an assise of novel disseisin. For albeit he may enter by reason of the condition broken, &c., yet he may choose either to relinquish his entry, or [formerly] to have an assise, &c. And so there is a diversity as to the tender of a rent which is issuing out of the land, and of the tender of another sum in gross which is not issuing out of any land.

NOTE.—This has nothing to do with the liability of the tenant to pay on his covenant: as to which see Note to Sect. 326, and the case there mentioned of Haldane v. Johnson (22 Law Tim. Rep. 11), which merits the attention of the student.

SECT. CCCXLII. *In a mortgage it is best to appoint a time and place for payment of the mortgage money.*—And, therefore, it will be a good and sure thing for him that will make such feoffment in mortgage, to appoint an especial place where the money shall be paid, and the more special that it be put the better it is for the feoffor. As if A enfeoff B to have

to him and to his heirs, upon such condition that if A pay to B on the feast of St. Michael the Archangel next coming, in the cathedral church of St. Paul's, in London, within four hours next before the hour of noon of the same feast, at the rood loft of the rood of the north door within the same church, or at the tomb of St. Erkenwald, or at the door of such a chapel, or at such a pillar, within the same church, that then it shall be lawful to the aforesaid A and his heirs to enter, &c.; in this case he needeth not to seek the feoffee in another place, nor to be in any other place, but in the place comprised in the indenture, nor to be there longer than the time specified in the same indenture, to tender or pay the money to the feoffee, &c.

NOTE.—It has been held that where no place of payment is agreed on in the mortgage deed, yet the mortgagor may give the mortgagee a notice of repayment at a particular place, and tender there (if not an unreasonable place, nor objected to by the mortgagee) will be good. (*Gyles v. Hall*, 2 P. Williams, 378; 2 Powell on Mortgages, by Coventry, 940.)

SECT. CCCXLIII. *Mortgagee not bound to receive the money in any other place than that agreed upon, but if he receive the money it is a good payment.*—Also, in such case, where the place of payment is limited, the feoffee is not bound to receive the payment in any other place, but in the same place so limited. But yet if he do receive the payment in another place, this is good enough, and as strong for the feoffor as if the receipt had been in the same place so limited, &c.

SECT. CCCXLVI. *Reservation of rent to a stranger, or to joint-tenants.*—And here note two things, one is, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift or lease, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and in no manner it may be reserved to any stranger. But if two joint-tenants make a lease by deed indented, reserving to one of them a certain yearly rent, this is good enough to him to whom the rent is reserved, for that he is privy to the lease, and not a stranger to the lease, &c.

NOTE.—Although rent cannot be reserved by a subject to a stranger to the reversion as stated by Littleton, yet the Sovereign may reserve it to a stranger. (*Co. Litt.* 143 b; 1 Barton's Convey. 349.)

As to a reservation of rent to joint-tenants, it may be observed that if there be two joint-tenants, and they make a lease by parol (where allowable, Sect. 59, note), or deed-

poll, reserving rent to one of them only, it will enure to both; but if the lease be by deed *indented*, the reservation will enure to him only to whom it was made, and not to the other; and the reason of this difference is, that where the lease is by deed poll, or by parol, the rent follows the reversion [Sect. 229], which is jointly in both the lessors; and besides, as the rent is a thing given to the joint-tenant to whom it is reserved in retribution for the land, he ought to be seised of the rent in the same manner as he is of the land for which it is given, which is equally for the benefit of his companion and himself; but where the lease is by indenture, they are estopped to claim the rent in any other manner than is reserved by the deed, because an indenture is the deed of each party, and no man is allowed to recede from his own solemn act. (Drake v. Munday, Cro. Car. 207; Co. Litt. 47; 1 Barton's Elem. Convey. 352; 4 Jarman's Convey. by Sweet, 236.)

SECT. CCCXLVII. *Formerly grantee, &c., of reversion, or stranger, could not have had the benefit of a condition of re-entry.*—The second thing is, that no entry nor re-entry (which is all one) might [*formerly*] have been reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and such re-entry could not be given to any other person. For if a man letteth land to another for term of life by indenture, rendering to the lessor and to his heirs a certain rent, and for default of payment a re-entry, &c., if afterwards the lessor by a deed granteth the reversion of the land to another in fee, and [*as was formerly necessary*, Notes to Sects. 225, 551] the tenant for term of life attorn, &c., if the rent be after behind, the grantee of the reversion may distrain for the rent, because that the rent is incident to the reversion [Sect. 229]; but he might not [*formerly*] enter into the land and oust the tenant, as the lessor might have done, or his heirs, if the reversion had been continued in them, &c. And in this case the entry was taken away for ever, for the grantee of the reversion could not [*formerly*] enter, *causâ quâ suprà*. And the lessor nor his heirs cannot enter; for if the lessor might enter, then he ought to be in his former estate, &c. [Sect. 325 and Note]; and this may not be, because he hath aliened from him the reversion.

NOTE.—Since Littleton's time, by 32 Hen. 8, c. 4, grantees and assignees of reversions shall have the like advantages against the lessees for life or years, their executors, &c., by entry for non-payment of the rent or for doing waste, or other forfeiture, and the same remedy by action only,

for not performing other conditions, covenants, or agreements, contained in the leases, against the lessees, as the lessors or grantors had. The statute also gives the lessees the same remedy against the grantees of the reversion, which they might have had against their grantors. (See on the statute Co. Litt. 215; 1 Steph. Com. 280; Coote's Landl. and Ten. 317; Bickford v. Parson, 12 Jur. 377; Wright v. Burroughes, 10 Jur. 968.)

The liability or rights of the assignee do not under the above statute extend to things happening before the assignment (*Grescott v. Green*, 1 Salkeld, 199; *St. Saviour's, Southwark v. Smith*, 3 Burrows, 1271; 1 Black. Rep. 351; S. C. 1 Fonbl. Eq. 355); and it seems that the 8 & 9 Vict. c. 106, s. 6, which enacts that after the 1st day of October, 1845, a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed (and which, according to *Mr. Neale* (*Real Prop. Acts*, 53), would give the assignee a right to enter for a breach of condition previous to the assignment), does not apply to conditions of re-entry, but is confined to original rights of entry by parties having nothing but a right of entry; in other words, to mere claimants of lands. Such is the construction which C. B. Pollock put on the Act in *Hunt v. Bishop*, 8 Exch. Rep. 675; S. C. 22 Law Journ. N. S. Exch. 337; 21 Law Tim. Rep. 92.

SECT. CCCXLVIII. *The lord by escheat shall not have the benefit of a condition of re-entry, but he is entitled to the rent.*—Also, if lord and tenant be, and the tenant make a lease for term of life, rendering to the lessor and his heirs such an annual rent, and for default of payment a re-entry, &c., if after the lessor dieth without heir during the life of the tenant for life, whereby the reversion cometh to the lord by way of escheat [Sect. 4], and after the rent of the tenant for life is behind, the lord may distrain the tenant for the rent behind, but he may not enter into the land by force of the condition, &c., because that he is not heir to the lessor, &c.

NOTE.—It is established, as a general proposition, that whatever estate or interest the tenant retains which could have passed to his heirs, if he had any, and which could be the subject of grant, that the lord by escheat may claim. Where, however, the very subject of the original grant has been aliened, and the tenant has received a consideration for that alienation, and has reserved to himself something *different* from the very subject of the original grant, as a rent,

&c., and in some other instances also, there the rights of the lord by escheat are qualified ; and he is said to take *tanquam hæres*, and is sometimes called an *assign* in law. (*Per Wigram*, V. C. in *Downe v. Morris*, 8 Jur. 486. See also *Taylor v. Haygarth*, 14 Sim. 8 ; *Onslow v. Wallis*, 13 Jur. 1085.) It has been decided that the land in the hands of the lord by escheat is subject to the payment of the debts of the party dying without heir. (*Evans v. Brown*, 6 Jur. 380.)

SECT. CCCLI. *On feoffment upon condition, if condition broken, the feoffor has no freehold till entry.*—But in cases of feoffment upon condition, where the feoffor may lawfully enter for the condition broken, &c., there the feoffor hath not the freehold before his entry, &c.

NOTE.—It is agreed upon as clear law that in case of the breach of a condition annexed to a *freehold* interest, actual entry is necessary to revest an estate of freehold in the grantor. Till entry, the *legal title* remains in the grantee, who, after breach, is capable of receiving a release or confirmation. But with respect to chattel interests, it has been contended that the breach of the condition vests the legal estate at once in the reversioner, so that it cannot be revived without a new grant, but the contrary is now established. (3 *Preston on Abstracts*, 397 ; *Co. Litt.* 203 b, n. (94), 153 a ; *Bowser v. Colby*, 1 Hare, 109 ; S. C. 5 Jur. 1178.)

Equity will relieve in some cases of forfeiture by breach of conditions or covenants, as for non-payment of rent or other matters capable of being measured by a money payment, but not where no money payment could be an adequate compensation. (*Elliot v. Turner*, 13 Sim. 477 ; *Hills v. Rowland*, 22 *Law Journ. N. S. Chanc.* 964) ; 4 *Jarman's Convey. by Sweet*, 366—368 ; 2 *Eden*, 322 ; 12 *Vesey*, 476.) So proceedings for forfeitures for non-payment of rent may be stopped at law, on payment into court, or to the landlord of all rent and arrears, together with costs. (*Doe v. Masters*, 3 *Barn. and Cres.* 490 ; *Doe v. Roe*, 3 *Dowl.* 557 ; *Wyatt v. Byron*, 1 *Com. Ben. Rep.* 623 ; 15 & 16 *Vict. c.* 76, s. 212.)

SECT. CCCLX. *Feoffment on condition that feoffee shall not alien, the condition is void.*—Also, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void ; because when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For, if such a condition should be good, then the condition should oust him of all the power which the law gives

him, which should be against reason, and therefore such a condition is void.

NOTE.—A condition that a lessee for years shall not alien is good. (*Blencowe v. Bugby*, 3 Wils. 234; *Greenway v. Adams*, 12 Ves. 395.) And though a condition attached to an estate in *fee*, or even for *life* (16 Jur. 212), against alienation in general is void, yet a proviso against alienation, with a gift over on such alienation, is good, being considered as equivalent to a limitation to one until he aliens, and, in that case, over to another, which has always been considered good. (*Dommett v. Bedford*, 6 Term Rep. 684; *Lewes v. Lewes*, 6 Sim. 304; *Re Dickson*, 1 Sim. N. S. 37; S. C. 15 Jur. 282; *Rochford v. Hackman*, 9 Hare, 475; S. C. 16 Jur. 212.)

SECT. CCCLXI. *Conditions restraining alienation to particular person are good.*—But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away all power of alienation from the feoffee, &c., then such condition is good.

SECT. CCCLXX. *All the parts of an indenture are but one deed in law.*—And for that such conditions are most commonly put and specified in deeds indented, somewhat shall be here said of an indenture, and of a deed-poll concerning conditions. And it is to be understood, that if the indenture [Note to Sect. 70] be bipartite, or tripartite, or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect as all the parts together be.

NOTE.—Formerly it was usual to write out as many copies of the deed on one piece of parchment as there were parties to it, so that each party had a copy, and the parts were cut off in acute angles, thence called indentures. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantors is usually called the original, and the rest are called counterparts; though of late it is most frequent for all the parties to execute every part, which renders them all originals. (2 Black. Com. 296; *Peake's Evid.* 703, n. (w); 1 Steph. Com. 447.) But in this case each must be stamped as an original. (*Doe v. Smith*, 2 Jurist, 854.) The necessity of indentation (see Co. Litt. 143 b, 229 a, n. (2); 2 Black. Com. 295) is now obviated, it being enacted by 8 & 9 Vict. c. 106, s. 5, “that a deed executed after the first day of

October, 1845, *purporting to be an indenture*, shall have the effect of an indenture, although not actually indented."

SECT. CCCLXXIV. *Remainder-man entering under a deed indented, sealed by tenant for life, is bound by conditions therein contained, though he never sealed the deed.*—Also, if an estate be made by indenture to one for term of his life, the remainder to another in fee upon a certain condition, &c., and if the tenant for life have put his seal to the part of the indenture, and after dieth, and he in the remainder entereth into the land by the force of his remainder, &c., in this case he is tied to perform all the conditions comprised in the indenture, as the tenant for life ought to have done in his lifetime, and yet he in the remainder never sealed any part of the indenture. But the cause is, for that inasmuch as he entered and agreed to have the lands by force of the indenture, he is bound to perform the conditions within the same indenture, if he will have the land, &c.

SECT. CCCLXXVIII. *Conditions in law are such as are implied without any express words of the parties. Grants of offices, &c.*—Estates which men have upon condition in law are such estates which have a condition by the law to them annexed, albeit that it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another, if he will, &c. And such condition as is intended by the law to be annexed to anything is as strong as if the condition were put in writing.

SECT. CCCLXXIX. *Grant of office to be executed by grantee or his deputy; sufficient if deputy fill the office.*—In this manner it is of grants of the offices of steward, constable, bedel, bailiwick, or other offices, &c. But if such office be granted to a man, to have and to occupy by himself or his deputy, then if the office be occupied by him or his deputy, as it ought by the law to be occupied, this sufficeth for him, or otherwise the grantor and his heirs may oust the grantee, as is aforesaid.

SECT. CCCLXXX. *Estates in lands may be made upon condition in law: as an estate to husband and wife during their coverture.*—Also, estates of lands or tenements may be made upon condition in law, albeit upon the estate made there was

not any mention or rehearsal made of this condition. As put the case, that a lease be made to the husband and wife, to have and to hold to them during the coverture between them, in this case they have an estate for term of their two lives upon condition in law, *scilicet*, if one of them die, or that there be a divorce between them, then it shall be lawful for the lessor and his heirs to enter, &c.

NOTE.—The above is a *limitation*, and not a condition. (Co. Litt. 234 b, 235 a; Com. Dig. tit. "Condition," T.) The divorce of which Littleton speaks is such as dissolves the marriage à *vinculo matrimonii*, and maketh the issue bastard, which happens only properly where there was some canonical impediment *prior* to the marriage, though, indeed, such a divorce is sometimes granted by a private Act of Parliament by reason of adultery. The other sort of divorce is only à *mensâ et thoro*, and is for causes arising after the marriage, including adultery. This kind of divorce does not annul the marriage, and would not therefore put an end to the estate in Littleton's case above put. (Co. Litt. 235 a; 1 Black. Com. 440, 457; 2 Steph. Com. 311; 8 Jurist, 719.)

SECT. CCCLXXXI. *Proof that the husband and wife have, in the case put in the previous section, an estate for their own lives.*—And that they have an estate for term of their two lives is proved thus: Every man that hath an estate of freehold in any lands or tenements, either he hath an estate in fee, or in fee tail, or for term of his own life, or for term of another man's life, and by such a lease they have a freehold, but they have not by this grant fee, nor fee tail, nor for term of another's life; *ergo*, they have an estate for term of their own lives; but this is upon condition in law, in form aforesaid, and in this case if they shall do waste, the feoffor should [*formerly*] have had a writ of waste against them, supposing by his writ, *quod tenet ad terminum vitæ*, &c., but in his count he shall declare how and in what manner the lease was made.

SECT. CCCLXXXIII. *On devise to executors to sell, they ought to sell as soon as they can reasonably do so, and cannot take them to their own use.*—Also, a man may see in the Book of Assizes, anno 38 E. 3, p. 3, a plea of assize in this form following, *scil.* An assize of *novel disseisin* was some time brought against A., who pleaded to the assize, and it was found by verdict that the ancestor of the plaintiff devised his lands to be sold by the defendant, who was his executor [Sect. 169], and to make distribution of the money for his soul; and it was found that presently after the death of the testator, one ten-

dered to him a certain sum of money for the lands, but not to the value, and that the executor afterwards held the lands in his own hands two years, to the intent to sell the same dearer to some other, and it was found that he had all the time taken the profits of the lands to his own use, without doing anything for the soul of the deceased, &c. Moubray, Justice, said, the executor in this case is bound by the law to make the sale as soon as he may after the death of the testator, and it is found that he refused to make sale, and so there was a default in him, and so by force of the devise he was bound to put all the profits coming of the lands to the use of the dead, and it is found that he took them to his own use, and so another default in him. Wherefore it was adjudged that the plaintiff should recover. And so it appeareth by the said judgment, that by force of the said devise, the executor had no estate nor power in the lands, but upon condition in law.

NOTE.—It is laid down by Lord Coke (1 Inst. 236 a), that where a man devises *that his executor shall sell* the land, there the lands descend in the mean time to the heir, and until the sale is made the heir may enter and take the profits; but when the land is *devised to his executor to be sold*, then the devise takes away the descent and vests the estate of the land in the executor, and he may enter and take the profits, and make sale according to the devise. (Co. Litt. 236.) The soundness of this distinction has, however, been denied by Mr. Hargrave, Co. Litt. 133 a, n.; and see Mr. Jarman's ed. of Powell on Devises, vol. 1, p. 245.

DESCENTS TOLLING ENTRIES.

SECT. CCCLXXXV. *What descents in fee formerly tolled entries.*—Descents which [*formerly*] tolled entries were in two manners, to wit, where the descent was in fee, or in fee tail. Descents in fee which tolled entries were, as if a man seised of certain lands or tenements, was by another disseised, and the disseisor had issue, and died of such estate seised, now the lands descended to the issue of the disseisor by course of law, as heir unto him. And because the law casts the lands or tenements upon the issue by force of the descent [Sect. 448], so as the issue cometh to the lands by course of law, and not by his own act, the entry of the disseissee was taken away, and he was [*formerly*] put to sue a writ of *entrie sur disseisin*, against the heir of the disseisor, to recover the land.

NOTE.—By 3 & 4 Will. 4, c. 27, s. 39, no descent cast happening after the 31st Dec. 1833, shall toll or defeat any right of

entry, or action for the recovery of land. (3 Steph. Com. 492.) The doctrines, therefore, of descents tolling entries, which formed so large a part of the old law, is, except as to transactions prior to the 31st Dec. 1833, obsolete.

SECT. CCCXCVIII. *The entry of one coparcener was the entry of all, for they claim by one title; but there might and may now be a disseisin of one coparcener by her companion.*—In the same manner it was, if a man seised of certain land in fee had issue two daughters, and died, and the eldest daughter entered into the land claiming all to her, and thereof alone took the profits, and had issue and died seised, by which her issue entered, which issue had issue and died seised, *et sic ultra*, yet the younger daughter, or her issue as to the moiety [see Note to Sect. 254], might enter upon any issue whatsoever of the elder daughter, notwithstanding such descent, for that they claim by one same title, &c. But in such case where both sisters entered after the death of their father, and were thereof seised, and after the eldest sister disseised the younger of her part, and was thereof seised in fee, and had issue, and of such estate died seised, whereby the lands descended to the issue of the elder sister, then neither the younger sister nor her heirs could have entered, &c., *causâ quâ supra*, &c.

NOTE.—For almost all purposes the possession of one coparcener was, formerly, considered as the possession of his companions. (2 Preston on Abstracts, 70; Reading v. Royston, 2 Salk. 423; Fairclaim v. Shakleton, 5 Burr. 2604; Fisher v. Prosser, Cowp. 217; 2 Black. Com. 188; 5 Barn. and Adol. 583; 2 Sim. and Stuart, 144.) But by 3 & 4 Will. 4, c. 27, s. 12, if one or more coparcener shall be in possession of the *entirety, or more than his, her, or their share*, for his, or her, or their own benefit, or for the benefit of any other person than the coparcener, such possession shall not be deemed the possession of the other coparcener. This provision is retrospective as well as prospective. (Culley v. Taylerson, 11 Adol. and Ellis, 1008.)

SECT. CCCC. *Where a person was non-sane at the time of a descent cast, his entry was said to be tolled, because it was then held that he could not be received to disable himself, but after his death his heir might have entered.*—Also, if a man which is of non-sane memory, that is to say, in Latin *qui non est compos mentis*, had cause to enter into any such tenements, if such descent, *ut supra* [Sect. 385], was had in his life during the time that he was not of sound memory, and after he died, his heir might well have entered upon him which was in by descent.

And in this case you see a case where the heir might have entered, and yet his ancestor which had the same title could not have entered. For he which was out of his memory at the time of such descent, if he would have entered after such a descent, if an action upon this was sued against him, he had nothing to plead for himself, or to help him, but to say that he was not of sane memory at the time of such descent, &c. And he should not [*formerly*] have been received to say this, for that no man of full age could [*formerly*] have been received in any plea by the law to disable his own person, but the heir might well disable the person of his ancestor for his own advantage in such case, for that no laches could be adjudged by the law in him which had no discretion in such case.

NOTE.—The doctrine that a person non-sane could not aver his want of understanding, has been the subject of much learned disquisition, and has been doubted by some. (See 2 Black. Com. 291, 292; Co. Litt. 247 a, n. 2; 5 Barn. and Cres. 170; 4 Coke's Rep. 123.) But the leaning of modern times is against the old doctrine. (See *Yates v. Boen*, 2 Strange, 1104; 5 Jur. 1151; *Gore v. Gibson*, 13 Mees. and Wels. 623; S. C. 9 Jur. 141, and note there.) In the case of *Molton v. Camroux* (2 Exch. Rep. 487; S. C. 12 Jur. 804; in error, 4 Exch. Rep. 17; 18 Law Journ. N. S. Exch. 356) Pollock, C. B., after observing that the older authorities differed, said, "according to the opinion of Littleton (s. 405) and Lord Coke (1 Inst. 247 b), and *Beverley's case* (4 Co. Rep. 123), no man could be allowed to stultify himself and avoid his acts on the ground of his being non compos mentis; but certainly the law did not allow the party himself to set aside by any plea of insanity acts of a public and notorious character, such as acts done in a Court of Record and feoffments with livery of seisin, the doing or executing of which would not presumably be allowed unless a party appeared to be of sound mind. But the rule as above laid down by Littleton and Coke has no doubt in modern times been relaxed, and unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it."

OF CONTINUAL CLAIM.

SECT. CCCCXIV. *Continual claim made by disseisee prevented a descent cast from tolling his or his heir's entry.*—Continual claim was where a man had right and title to enter into any

lands or tenements whereof another was seised in fee or in fee tail, if he which had title to enter made continual claim to the lands or tenements before the dying seised of him which held the tenements, then albeit that such tenant died thereof seised, and the lands and tenements descended to his heir, yet might he who had made such continual claim, or his heir, enter into the lands or tenements so descended, by reason of the continual claim made, notwithstanding the descent. As in case that a man was disseised and the disseisee made continual claim to the tenements in the life of the disseisor, although that the disseisor died seised in fee, and the land descended to his heir, yet might the disseisee have [*formerly*] entered upon the possession of the heir, notwithstanding the descent.

NOTE.—By 3 & 4 Will. 4, c. 27, s. 11, it is enacted that no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action. (1 Steph. Com. 473; Shelford's Real Prop. Stats. 137, 3rd edit.) The claim must have been repeated once in the space of every year and a day. It must be borne in mind that now a mere entry will not give any right, it being enacted by 3 & 4 Will. 4, c. 27, s. 10, that no person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon. In other words a mere entry, not made *animo possidendi*, but only as a formal act, and not followed up by an action of ejectment, will not operate to stay the running of the Statute of Limitation. (See *per* Ld. Campbell in *Randall v. Stevens*, 18 Jurist, 130.)

OF RELEASES.

SECT. CCCCXLIV. *Releases are of a man's right in real [or personal] property, or of his rights of action.*—Releases are in divers manners, viz., releases of all the right which a man hath in lands or tenements, and releases of actions personal and real, and other things. Releases of all the right which men have in lands and tenements, &c., are commonly made in this form, or of this effect.

SECT. CCCCXLV. *The form of a release of right in lands, &c.*
 —“Know all men by these presents, that I, A of B, have
 “remised, released, and altogether from me and my heirs quit
 “claimed:” or thus, “for me and my heirs quit claimed to C of
 “D all the right, title, and claim which I have, or by any
 “means may have, of and in one messuage with the appur-

“tenances in F, &c.” And it is to be understood that these words, *remisisse*, et *quietum clamasse*, are of the same effect as the word, *relaxasse*.

SECT. CCCCXLVI. *No right passes by a release, except that which releasor had at the time—Release by son of disseisee in the latter's lifetime to disseisor is of no avail.*—Also these words, which are commonly put in such releases, *scilicet (quæ quovismodo in futurum habere potero)* are as void in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised and the son (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warranty, &c. [Sect. 697], and after the father dieth, &c., the son may lawfully enter upon the possession of the disseisor, for that he had no right in the land in his father's life, but the right descended to him after the release made by the death of his father, &c.

NOTE.—As Littleton makes such frequent reference to disseisins, we should observe that this was usually accomplished by a feoffment, but as we have seen (Note to Sect. 59) a feoffment has not now any tortious operation (8 & 9 Vict. c. 106, s. 4), and it does not now consequently create a disseisin. But what is stated as to releases by disseisors and disseisees will be found to apply to the cases of persons in possession who have either obtained a title by the Statute of Limitations, or are in the course of so doing; and to persons out of possession whose right is either barred by the Statute of Limitations, or is in the course of being so barred. We should add, however, that when the period allowed to a person out of possession for making his entry or bringing his action has expired, the right and title of such person to the land is *extinguished*; formerly the *remedy* only was barred. (3 & 4 Will. 4, c. 27, s. 34.) In fact, the statute transfers the right and title of the real owner to the person whose possession is a bar. (*Incorporated Society v. Richards*, 1 Drury and War. 258.) So that, strictly speaking, after the statute has operated the person barred has no right to release. (Note to Sect. 508.) As Littleton speaks of future rights and interests, it will be convenient to notice here some provisions of a recent statute relative to the disposition of such interests. By 8 & 9 Vict. c. 106, s. 6, it is enacted, “that after the first day of October, One thousand eight hundred and forty-five, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the

object of the gift or limitation of such interest or possibility be or be not ascertained; also, a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force only of this Act, defeat or enlarge an estate tail; and that every such disposition by a married woman shall be made conformably to the provisions relative to dispositions by married women of an Act passed in the 3 & 4 Will. 4, c. 74." Notwithstanding the extensive words of the statute, the release by the son, in the case put by Littleton, would not take away his right of entry, for the statute does not apply to such an interest, which is merely a bare possibility or hope of succession. (See Fearn's Conting. Rem. 370, 412, 548, 9th edit.; Burt. Comp. pl. 47.)

SECT. CCCXLVII. *A release of a bare right to land must be to the person having the freehold.*—Also, in the releases of all the right which a man hath in certain lands, &c., it behoveth him to whom the release is made in any ["some" seems the proper translation, see Sect. 449] case, that he hath the freehold in the lands in deed, or in law [Sect. 681], at the time of the release made, &c.; for in every case where he to whom the release is made hath the freehold in deed or in law at the time of the release, &c., there the release is good.

NOTE.—Littleton is speaking of a release (*per mitter le droit*) of a right of freehold at the least, and not of a mere chattel interest (Co. Litt. 265 b); for a release which operates by way of *enlargement* may be made to a person who has only a *chattel* interest, as to a lessee for years, on his making an actual entry, and perhaps now without. (See Note to Sect. 58; Sect. 459; Co. Litt. 270, and Butler's notes; Gilb. Ten. 69, 300, by Watkins.)

SECT. CCCXLVIII. *"Freehold" defined*—Release to the heir before entry is good, as he has a freehold in law—Dower of seisin in law.—Freehold in law [Sect. 681] is, as if a man disseiseth another and dieth seised, whereby the tenements descend to his son; albeit that his son doth not enter into the tenements, yet he hath a freehold in law, which by force of the descent is cast upon him [Sects. 385, 681]; and, therefore, a release made to him, so being seised of a freehold in law, is good enough; and if he taketh wife, being so seised in law, although he never enter in deed and dieth, his wife shall be endowed.

NOTE.—A wife was always endowable where her husband had a seisin in law, but a husband was not, and is not now entitled to curtesy of a seisin in law, where by possibility the wife might have obtained an actual seisin (Com. Dig. tits. “Dower,” A. 4, and “Estates,” D. 1); as we have seen (Note to Sect. 36) the wife is entitled to dower though her husband did not obtain seisin, and he was entitled to merely a right of entry or action in any land.

SECT. CCCCXLIX. *A release to the reversioner or remainderman is good—Lease by disseisor to stranger for life; the release of disseisee is good.*—Also, in some cases of releases of all the right, albeit that he to whom the release is made hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which he hath by disseisin to another for term of his life, saving the reversion to him, if the disseisee or his heir release to the disseisor all the right, &c., this release is good, because he to whom the release is made had in law a reversion at the time of the release made.

SECT. CCCCLII. *A release to the reversioner or remainderman may serve the freeholder, but he must formerly have made profert of the deed.*—And note, that every release made to him which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as him to whom the release was made, if the tenant hath the release in his hand to plead.

NOTE.—The above and following sections were quoted by counsel in the case of *Bain v. Cooper* (8 Mees. and Wels. 751; S. C. 9 *Id.* 701; 1 Dowl. N. S. 11; 5 Jurist, 873), where Mr. Baron Parke in delivering judgment said:—“The general rule with respect to making profert is correctly stated in *Dangerfield v. Thomas* (9 Adol. and Ellis, 292), namely, that a party is not required to make profert of an instrument to the possession of which he is not entitled. The only exceptions to that rule are, where the party pleading acts as tenant of another, or where there is privity of interest between them, *as in the case of a release to a reversioner, of which the tenant for life may avail him.* So also in the cases of heir and executor, who may plead a release to the ancestor or testator whom they respectively represent; so also with respect to several tortfeasors, for in all these cases there is a privity between the parties which constitutes an identity of person.” By the 15 & 16 Vict. c. 76, s. 55, profert of a deed is not now necessary.

SECT. CCCCLIII. *A release to tenant for life may enure to the benefit of the reversioner or remainder-man, but they must formerly have made profert of it.*—In the same manner it is, where a release is made to the tenant for life, or to the tenant in tail, this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold, and they shall have as great advantage of this, if they can show it. [Note to Sect. 452.]

SECT. CCCCLIX. *A release to lessee for years before his entry is void, but it is good if after entry.*—Also, if a man letteth to another his land for term of years, if the lessor release to the lessee all his right, &c., before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to him by reason of the privity which by force of the lease is between them, &c.

NOTE.—See as to entry not being necessary where term created by deed operating under the Statute of Uses, Note to Sect. 58; Burton's Comp. pl. 131, 148, 149. What Littleton says in the above section as to a release to a lessee before entry being void, must be understood of a lease at common law; for if it be so framed as to be a bargain and sale under the Statute of Uses, the possession is immediately executed in the lessee, so that no entry is necessary. (Co. Litt. 270 a, n. (2), 271 b, n. (1); Bythewood's Note (b) to Noy's Max. 176.) And even though it should continue to be held that in the case of a common law lease having the word "grant" (Note to Sect. 58), entry is necessary to enable the lessee to receive a release; yet it must be borne in mind that the release is not without some operation, for it is clearly settled that it will *extinguish* the rent. (Co. Litt. 270 a.)

SECT. CCCCLX. *Release by way of enlargement of estate to tenant at will is valid.*—In the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will [Sect. 68], by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c., this release is good enough for the privity which is between them; for it shall be in vain to make an

estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

NOTE.—But the lessor in the above case has no reversion (1 Steph. Com. 299; 8 Coke's Rep. 75 a), and consequently he cannot grant the estate as a reversion to a stranger. (2 Sand. Uses, 34, n., 4th edit.; Burton's Comp. pl. 55.)

SECT. CCCCLXI. *Release by way of enlargement to tenant at sufferance is void.*—But where a man of his own head occupieth lands or tenements at the will of him which hath the freehold, and such occupier claimeth nothing but at will, &c., if he which hath the freehold will release all his right to the occupier, &c., this release is void, because there is no privity between them by the lease made to the occupier, nor by other manner, &c.

NOTE.—It is clear that Littleton refers to a tenancy at sufferance, which is where a tenant, after the expiration of a lawful estate, continues in possession without any new contract.

SECT. CCCCLXV. *Release to enlarge an estate. A release in fee should have words of inheritance.*—Also, releases according to the matter in fact sometimes have their effect by force to enlarge the estate of him to whom the release is made. As, if I let certain land to one for term of years, by force whereof he is in possession [Notes to Sects. 58, 459], and after I release to him all the right which I have in the land, without putting more words in the deed, and deliver to him the deed, then hath he an estate but for the term of his life. And the reason is, for that when the reversion or remainder is in a man who will by his release enlarge the estate of the tenant, &c., he shall have no greater estate, but in such manner and form as if such lessor were seised in fee, and by his deed will make an estate to one in a certain form, and deliver to him seisin by force of the same deed: if in such deed or feoffment there be not any word of inheritance, then he hath but an estate for life [Note to Sect. 56]; and so it is in such releases made by those in the reversion or in the remainder. For if I let land to a man for term of his life, and after I release to him all my right without more saying in the release, his estate is not enlarged. But if I release to him and his heirs [Sect. 1], then he hath a fee simple; and if I release to him and to his heirs of his body begotten [Sect. 14], then he hath a fee tail, &c. And so it behoveth to specify in the deed what estate he to whom the release is made shall have.

NOTE.—A release from one joint-tenant in fee to another passes the whole estate without the word “heirs.” (Burt. pl. 57.)

SECT. CCCCLXVI. *Release by way of mitter le droit. If disseisee release to disseisor, the wrongful estate becomes a lawful one.*—Also, sometimes releases shall enure *de mitter* and vest the right of him which makes the release to him to whom the release is made. As if a man be disseised, and he releaseth to his disseisor all his right, in this case the disseisor hath his right, so as where before his estate was wrongful, now by this release it is made lawful and right.

NOTE.—Here Littleton treats of releases which operate by *mitter le droit*. (2 Black. Com. 325 ; 1 Steph. Com. 481, 482.) Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases the possession is in the releasee; the right in the releasor; and the uniting the right to the possession completes the title of the releasee; but the different degrees of title in the disseisor, his feoffee or his heir, give the releases made to them different operations. They all agree in this respect, that no privity is required, or indeed can, from the nature of the case, exist between them and the releasor.

SECT. CCCCLXVII. *A release by mitter le droit will pass a fee without words of inheritance.*—But here note, that when a man is seised in fee simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speak of the heirs of him to whom the release is made, for that he hath a fee simple at the time of the release made. For if the release was made to him for a day, or an hour, this shall be as strong to him in law, as if he had released to him and his heirs. For when his right was once gone from him by his release without any condition, &c., to him that hath the fee simple, it is gone for ever.

SECT. CCCCLXVIII. *A release by reversioner, &c., in fee, to tenant, operates by enlargement, and the quantum of estate should be expressed.*—But where a man hath a reversion in fee simple, or remainder in fee simple, at the time of the release made, there if he will release to the tenant for years [Sect. 459 and note], or for life, or to the tenant in tail, he ought to determine the estate, which he to whom the release is made shall have by force of the same release, for that such release shall enure to enlarge the estate of him to whom the release is made.

SECT. CCCCLXIX. *Releases by mitter le droit pass all a man's right without words of inheritance, &c.*—But otherwise it is, where a man hath but a right to the land, and hath nothing in the reversion nor in the remainder in deed. For if such a man release all his right to one which is tenant of the freehold, all his right is gone, albeit no mention be made of the heirs of him to whom the release is made. For if I let lands to one for the term of his life, if I after release to him to enlarge his estate, it behoveth that I release to him and to his heirs of his body engendered, or to him and his heirs, or by these words, "to have and to hold to him and to his heirs of his body engendered" [Sect. 14], or, "to the heirs males of his body engendered" [Sect. 21], or such like estates, or otherwise he hath no greater estate than he had before.

SECT. CCCCLXXIX. *In what cases releases enure by way of extinguishment.*—But releases which enure by way of extinguishment against all persons, are where he to whom the release is made cannot have that which to him is released. As if there be lord and tenant, and the lord release to the tenant all the right which he hath in the seignory, or all the right which he hath in the land, &c., this release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himself.

SECT. CCCCLXXX. *Release to tenant of rent, &c., enures by way of extinguishment.*—In the same manner is it of a release made to the tenant of the land of a rent-charge or common of pasture, because the tenant cannot have that which to him is released, &c., so such releases shall enure by way of extinguishment in all ways.

SECT. CCCXCIVIL. *A man may take his goods, notwithstanding a release.*—In the same manner it is of things personal: as if a man by wrong take away my goods, if I release to him all actions personal, yet I may by the law take my goods out of his possession [*for that nothing was released but the action*].

SECT. CCCXCVIII. *Detinue. Release.*—Also, if I have any cause to have a writ of detinue of my goods against another, albeit that I release to him all actions personal, yet I may by the law take my goods out of his possession, because no right of the goods is released to him, but only the action, &c. [See preceding Section.]

SECT. DIV. *Release of actions does not extend to executions.*—Also, if a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet he may lawfully sue execution by *capias ad satisfaciendum*, or by *elegit*, or *fieri facias*; for execution upon such a writ cannot be said an action.

NOTE.—By a release of “all suits” the party is barred of his execution (Co. Litt. 291; 8 Coke’s Rep. 153; 6 Bacon’s Abr. 633), except at the King’s suit.

SECT. DVII. *Executions should be released by name.*—But where a man recovereth debt or damages, and it is agreed between them that the plaintiff shall not sue execution, then it behoveth that the plaintiff make a release to him of all manner of executions.

SECT. DVIII. *A release of “demands” is the best release.*—Also, if a man release to another all manner of demands, this is the best release to him to whom the release is made that he can have, and shall enure most to his advantage. For by such release of all manner of demands, all manner of actions real, personal, and actions of appeal [*before abolition*] are taken away and extinct, and all manner of executions are taken away and extinct.

NOTE.—A release of all demands will not discharge a covenant for an unliquidated demand not broken at the time. (Co. Litt. 290 b; 6 Bacon’s Abr. 630, 7th edit.; Com. Dig. tit. “Release,” E. 1; 3 Barn. and Adol. 175; Shepp. Touchst. 261, n. 1; Harrison and Edwards’ Nisi Prius, 344.) See as to a covenant or bond for payment of a liquidated sum of money, Sect. 512. A reversion will not be held to be included in the general terms of the release of a debt. (8 Vesey, 417.)

SECT. DIX. *Entry into lands. Release.*—And if a man hath title of entry into any lands or tenements, by such a release his title [*of entry*] is taken away. *Sed quære de hoc*, for Fitz-James, Chief Justice of England, holdeth the contrary, because an entry cannot be properly said a demand.

NOTE.—As to the quære, Coke says that is an addition, and no part of Littleton, and the opinion is clearly against law. (See Comyns’ Dig. tit. “Release” (E. 1); Co. Litt. 291; 4 Barton’s Elem. Convey. 223.) Prior to the abolition of writs of right by the 3 & 4 Will. 4, c. 27, the party making such a release as the above was still capable of recovering the land, for he might have had a writ of right

which did not require a right of entry in the party; but now lands cannot be recovered where the right of entry is gone. (3 & 4 Will. 4, c. 27, s. 2; Note to Sect. 446.)

SECT. DX. *Rent-service, &c., is extinguished by release.*—And if a man hath a rent-service or rent-charge, or common of pasture, &c., by such a release of all manner of demands made to the tenants of the land out of which the service or the rent is issuing, or in which the common is, the service, the rent, and the common is taken away, and extinct, &c.

NOTE.—As to what is said of a rent-service, it seems that it must be confined to a rent-service in gross as a seignory. (See 6 Bacon's Abr. 631, 7th edit.; Hen v. Hanson, Levinz, 99, 100; Stephen v. Snow, 2 Salkeld, 578; *ante*, Note to Sect. 508; 4 Barton's Elem. Convey. 225, 226.)

SECT. DXII. *Release of actions discharges bonds for payment of money at a future day.*—Also, if a man by his deed be bound to another in a certain sum of money, to pay at the feast of St. Michael next ensuing, if the obligee before the said feast release to the obligor all actions, he shall be barred of the duty for ever, and yet he could not have an action at the time of the release made.

NOTE.—Such a release will not discharge a rent before the day of payment. (See next section.) Nor will it discharge a covenant for an unliquidated demand. (Sect. 508; Co. Litt. 292 b; 2 Bac. Abr. 337, 7th edit.)

SECT. DXIII. *Rent not due is not affected by release of actions.*—But if a man letteth land to another for a year, to yield to him at the feast of St. Michael next ensuing 40s., and afterwards, before the same feast, he releaseth to the lessee all actions, yet after the same feast he shall have an action of debt for the non-payment of the 40s., notwithstanding the said release. *Stude causam diversitatis* between these two cases.

NOTE.—The reason is, because the rent is neither *debitum* nor *solvendum* at the time of the release, nor is it merely a thing in action, for it may be granted over. (Co. Litt. 292 b; 6 Bacon's Abr. 632, 7th edit.; 4 Barton's Elem. Convey. 227; in which last books the word "Debt" is inserted instead of "Rent."

OF CONFIRMATION.

SECT. DXV. *Form of deed of confirmation.*—A deed of confirmation is commonly in this form, or to this effect: *Know all men, &c., that I, A of B, have ratified, approved, and confirmed to C of D the estate and possession which he hath of and in one messuage, &c., with the appurtenances, in F, &c.*

NOTE.—Modern deeds, called confirmations, are not, strictly speaking, confirmations; for, being generally by lease and release, they have a more extensive operation than a simple confirmation at common law. (3 Jarman and Byth. Convey. by Sweet, 593.)

SECT. DXVI. *A confirmation is, in some cases, better than a release.*—And in some case a deed of confirmation is good and available, where in the same case a deed of release is not good nor available. As if I let land to a man for term of his life, who letteth the same to another for term of forty years, by force of which he is in possession [Note to Sect. 58]; if I by my deed confirm the estate of the tenant for years, and after the tenant for life dieth during the term of years, I cannot enter into the land during the said term.

NOTE.—Quære, whether this is properly a confirmation. (Gilbert's Ten. 75; 9 Coke's Rep. 142; 3 Jarm. and Bythew. Convey. 592.) The original lessee having an estate for his own life only could not by a mere lease for years ensure to the latter any term beyond his own life; but the deed of the reversioner makes the last lessee's estate for years as valid as if the confirming party had joined in the lease to him. (Burt. Comp. pl. 740, n.)

SECT. DXVII. *In release to tenant for years, there must be privity.*—Yet if I by my deed of release had released to the tenant for years in the lifetime of the tenant for life, this release shall be void, for that then there was not any privity between me and the tenant for years; for a release is not available to the tenant for years, but where there is a privity between him and him that releaseth.

NOTE.—But undoubtedly the deed, though not valid as a release, would, though purporting to be a release, be supported as a grant. (Burt. Comp. pl. 54; Shepp. Touchst. 326, n. g.)

SECT. DXXIII. *Joint-tenant's confirmation to his companion.*—And for this some have said, that if two joint-tenants be, and the one confirm the estate of the other, that he hath but a

joint estate, as he had before. But if he hath such words in the deed of confirmation, to have and to hold to him and to his heirs all the tenements whereof mention is made in the confirmation, then he hath a sole estate in the tenements, &c. And therefore it is a good and sure thing in every confirmation to have these words, "to have and to hold the tenements, &c., in fee, or in fee tail, or for term of life, or for term of years," according as the case is, or the matter lieth.

NOTE.—Sheppard (Touchstone, 314) calls the confirmation of the joint-tenant to his companion, a *grant*; but Mr. Atherley presumes that it would operate as a *release*; as joint-tenants may release (Note to Sect. 304), but could not formerly grant to each other. (See also note to Gilbert's Ten. 78.)

SECT. DXXIV. *Confirmation in fee to tenant for life of his estate does not extend to his heirs, though mentioned.*—For to the intent of some, if a man letteth land to another for life, and after confirm his estate [Sect. 545], which he hath in the same land, to have and to hold his estate to him and to his heirs, this confirmation as to his heirs is void, for his heirs cannot have his estate, which was but for term of his life. But if he confirm his estate by these words, to have the same land to him and to his heirs, this confirmation maketh a fee simple in this case to him in the land, for that the words "to have and to hold," &c., go to the land, and not to the estate which he hath, &c.

NOTE.—The distinction is in the use of the words "estate" and "land"; in the former case nothing *new* is granted, so that the confirmation to the *heirs* is void. (See Gilb. Ten. 78.)

SECT. DXXV. *Confirmation to husband and wife seised in right of the wife.*—Also, if I let certain land to a *feme sole* for term of her life, who taketh husband, and after I confirm the estate of the husband and wife, to have and to hold for term of their two lives; in this case the husband doth not hold jointly with his wife, but holdeth in right of his wife for term of her life. But this confirmation shall enure to the husband by way of remainder for term of his life, if he surviveth his wife.

NOTE.—Strictly this is not a remainder, but, as Coke says (Co. Litt. 299 b), it is certainly in the nature of a remainder. (6 Bac. Abr. 754, 7th edit.)

SECT. DXXVI. *Confirmation to husband and wife of leaseholds of the wife.*—But if I let land to a *feme sole* for term of years, who taketh husband, and after I confirm the estate of

the husband and his wife, to have and to hold the land for term of their two lives; in this case they have a joint-estate in the freehold of the land, for that the wife had no freehold before, &c.

SECT. DXXVIII. *Charge of glebe by parson and confirmation by patron and ordinary.*—Also, if a parson of a church charge the glebe land of his church by his deed, and after the patron and ordinary confirm the same grant, and all that is comprised in the same grant, then the grant shall stand in its force, according to the purport of the same grant. But in this case it behoveth that the patron hath a fee simple in the advowson; for if he hath but an estate for life or in tail in the advowson, then the grant shall not stand but during his life, and the life of the parson which granted, &c.

NOTE.—By 13 Eliz. c. 20, “all charging of benefices with cure, and not being impropriated, with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made, according to the meaning of this Act, shall be utterly void.” This Act was repealed by 43 Geo. 3, c. 84, which was itself repealed by 57 Geo. 3, c. 99; the effect of which was to set up again the 13 Eliz. c. 20, except so far as it was repealed by 57 Geo. 3, c. 99, which did not, however, affect the above provision against charging. (*Doe v. Gully*, 9 Barn. and Cres. 344; *Metcalfe v. Archbishop of York*, 1 Myl. and Craig, 547; 5 Jarman’s Convey. by Sweet, 214.) In *Shaw v. Pritchard* (5 Mann. and Ryl. 180; 10 Barn. and Cres. 241) the Court certified that a demise of a benefice for receiving an annuity made after the passing of the 57 Geo. 3, c. 99, was invalid, “being in substance a charging of the benefice within the meaning of 13 Eliz. c. 20, which, so far as relates to the charging of benefices, is now in force.” A warrant of attorney entitling the plaintiff to judgment and execution against a clergyman is valid if it do not in express terms allude to a sequestration of the living, though the effect of it will be to charge the living. (*Newland v. Watkin*, 9 Bing. 113; *Long v. Storie*, 3 De Gex and Sm. 308; S. C. 13 Jur. 227; see *Bates v. Brothers*, 17 Jur. 1175, which is now waiting for hearing on appeal.)

SECT. DXXIX. *Tenant for life granting rent in fee, with confirmation by reversioner.*—Also if a man letteth land for term of life, the which tenant for life charges the land with a rent in fee, and he in the reversion confirms the same grant, the charge is good enough and effectual.

SECT. DXXXII. *Confirmation by enlargement.*—Also, if I let land to a man, for term of years, by force whereof he is in possession, &c. [Sect. 58, and note], and after I make a deed to him, &c., *quodd dedi et concessi, &c.*, the said land to have for term of his life, and I deliver to him the deed, &c., then presently he hath an estate in the land for term of his life.

SECT. DXXXIII. *Confirmation by enlargement.*—And if I say in the deed, to have and to hold to him and to his heirs of his body engendered, he hath an estate in fee fail. [Sect. 14.] And if I say in the deed, to have and to hold to him and to his heirs, he hath an estate in fee simple. [Sect. 1.] For this shall enure to him by force of the confirmation to enlarge his estate.

NOTE.—Though an estate for life may be enlarged by confirmation, yet an estate tail clearly cannot be enlarged by confirmation to a fee simple. The reversion in fee, indeed, expectant upon an estate tail, may be granted or conveyed to the tenant in tail; but this would not be an enlargement of the estate tail, but the accession of a distinct estate. (Atherley's Note to Shepp. Touchst. 315.)

SECT. DXXXVI. *A rent-charge is not affected by grantee's confirmation.*—In the same manner it is, if a man hath a rent-charge, out of certain land, and he confirm the estate which the tenant hath in the land, yet the rent-charge remaineth to the confirmor.

SECT. DXXXVII. *Common of pasture is not destroyed by confirmation.*—In the same manner it is, if a man hath common of pasture in other land, if he confirm the estate of the tenant of the land, nothing shall pass from him of his common; but notwithstanding this, the common shall remain to him as it was before.

SECT. DXXXVIII. *Confirmation may abridge the services.*—But if there be lord and tenant, which tenant holdeth of his lord by the service of fealty and twenty shillings rent, if the lord by his deed confirm the estate of the tenant, to hold by twelve pence, or by a penny, or by a half-penny: in this case the tenant is discharged of all other services, and shall render nothing to the lord, but that which is comprised in the same confirmation.

SECT. DXXXIX. *No new reservation of services on confirmation.*—But if the lord will by his deed of confirmation

that the tenant in this case shall yield to him a hawk or a rose yearly at such a feast, &c., this confirmation is void, because he reserveth to him a new thing which was not parcel of his services before the confirmation: and so the lord may well by such confirmation abridge the services by which the tenant holdeth of him, but he cannot reserve to him new services.

SECT. DXLIII. *Grant enuring by way of extinguishment.*—And sometimes these words *dedi et concessi* shall enure by way of extinguishment of the thing given or granted; as if a tenant hold of his lord by certain rent, and the lord grant by his deed to the tenant and his heirs the rent, &c., this shall enure to the tenant by way of extinguishment, for by this grant the rent is extinct, &c.

SECT. DXLIV. *Grantee of rent-charge granting same to tenant.*—In the same manner it is, where one hath a rent-charge out of certain land, and he grant to the tenant of the land the rent-charge, &c. And the reason is, for that it appeareth, by the words of the grant, that the will of the donor is, that the tenant shall have the rent, &c. And inasmuch as he cannot have or perceive any rent out of his own land, therefore the deed shall be intended and taken for the most advantage and avail for the tenant that it may be taken, and this is by way of extinguishment.

SECT. DXLV. *Confirmation of estate for years.*—Also, if I [*being seised in fee*] let land to a man for term of years, and after I confirm his estate [Sect. 524] without putting more words in the deed, by this he hath no greater estate than for term of years, as he had before.

SECT. DXLVI. *Release to tenants for years.*—But if I release [Sect. 459] to him all my right which I have in the land, without putting more words in the deed, he hath an estate of freehold. [Sects. 468, 469.] So thou mayest understand, my son, divers great diversities between releases and confirmations.

SECT. DXLVII. *Release to under-lessee for part of term void; confirmation good.*—Also, if I being within age [Sect. 259] let land to another for term of twenty years, and after he granteth the land to another for term of ten years, so he granteth but parcel of his term; in this case when I am of full age, if I release to the grantee of my lessee, &c., this release is void, because there is no privity between him and me, &c. But if I

confirm his estate, then this confirmation is good. But if my lessee grant all his estate to another, then my release made to the grantee is good and effectual.

NOTE.—The lease by the infant was voidable merely and not void. (Note to Sect. 259.) That there is no privity between the first lessor and the second lessee, see Co. Litt. 308 a, n. 1. It would seem that the release to the grantee of the lessee would be supported as a grant. (Burt. Comp. pl. 54.)

SECT. DXLVIII. *Grantor of rent-charge for life cannot confirm it in tail, &c.*—Also, if a man grant a rent-charge issuing of his land to another for term of his life, and after he confirmeth his estate in the said rent, to have and to hold to him in fee tail or in fee simple, this confirmation is void as to enlarge his estate, because he that confirmeth hath not any reversion in the rent. [See Sect. 550.]

SECT. DXLIX. *Grantee of rent-charge in fee may confirm in tail, &c., his grant for life.*—But if a man be seised in fee of a rent-service or rent-charge, and he grant the rent to another for life, and the tenant attorneth, and after he confirmeth the estate of the grantee in fee tail, or in fee simple, this confirmation is good, as to enlarge his estate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reversion of the rent.

SECT. DL. *In the case in Sect. 548, there should be a new grant in tail, &c.*—But in the case aforesaid, where a man grants a rent-charge to another for term of life, if he will that the grantee should have an estate in tail or in fee, it behoveth that the deed of grant of the rent-charge for term of life be surrendered or cancelled, and then to make a new deed of the like rent-charge, to have and perceive to the grantee in tail or in fee, &c. *Ex paucis plurima concipit ingenium.*

OF ATTORNMENT.

SECT. DLI. *Attornment defined, and when [formerly] necessary.*—Attornment is, as if there be lord and tenant, and the lord will grant by his deed the services of his tenant to another for term of years, or for term of life, or in tail, or in fee, the tenant must [formerly] have attorned to the grantee in the life of the grantor, by force and virtue of the grant, or otherwise the grant was void. And attornment is no other in effect, but

when the tenant hath heard of the grant made by his lord, that the said tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, &c., or, I am well content with the grant made to you; but the most common attornment is to say, Sir, I attorn to you by force of the said grant, or, I become your tenant, &c., or to deliver to the grantee a penny, or half-penny, or a farthing, by way of attornment.

NOTE.—The necessity for attornment on a grant was in some measure avoided by the Statute of Uses: as, by that statute, the possession was immediately executed to the use; or, as Lord Coke (8 Rep. 94 a) says, there needs no attornment where the estate is executed by the Statute of Uses (*Birch v. Wright*, 1 Term Rep. 384; see 14 Jur. 1020; 17 *Id.* 1162); and by the Statute of Wills, by which the legal estate is immediately vested in the devisee. (Noy's Max. 164, Byth. ed.) Yet attornment continued to be necessary after this in many cases. But both the necessity and efficacy of attornments have been almost totally taken away by 4 & 5 Anne, c. 16, ss. 9 & 10, and 11 Geo. 2, c. 19, s. 11. We have before (Note to Sect. 225) stated the provisions of the former Act, and we will now give those of the 11 Geo. 2, c. 19, which enacts "that the attornments of tenants to strangers claiming title to the estate of their landlords shall be absolutely null and void to all intents and purposes whatsoever, and that the possession of their respective landlord or landlords, lessor or lessors, shall not be deemed or construed to be in anywise changed, altered, or affected by any such attornment or attornments: *provided*, that nothing herein contained shall extend to vacate or affect any attornment made pursuant to, and in consequence of, some judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee *after* the mortgage is become forfeited." Actual attornment is seldom heard of in practice, except to a receiver (whose appointment by the Court of Chancery is usually accompanied by an order for the attornment of the tenants); or in the case of a recovery in ejectment, where the tenants frequently attorn to the lessor of the plaintiff, in order to save the expense of the sheriff's poundage and officer's fees on executing a writ of possession. (*Coventry's Pow. Mortg.* 174, 302.) However, where a rent is stated to have been granted prior to the date of the statute of 4 & 5 Anne, c. 16, an express averment of attornment, or some equivalent allegation, must be made. (*Vigers v. Dean, &c.*, of St. Paul's,

14 Jurist, 1017.) The doctrine of attornments is not, therefore, quite obsolete.

SECT. DLIX. *Grant of services to tenant and his wife.*—In this manner it is, if there be lord and tenant, and the tenant taketh wife, and after the lord grant the services to the wife and her heirs, and the husband accepteth the deed; in this case after the death of the husband, the wife and her heirs shall have the services, &c., for by the acceptance of the deed by the husband, this was a good attornment, &c., albeit during the coverture the services shall be put in suspense, &c.

SECT. DLXXII. *By grant of reversion, rent-service will pass.*—And it is to be understood, that where a lease for years or for life, or a gift in tail, is made to any man, reserving to such lessor or donor a certain rent, &c., if such lessor or donor grant his reversion to another, and the tenant of the land attorned [*when attornment was necessary*, Note to Sect. 551], the rent passeth to the grantee, although that in the deed of the grant of the reversion no mention be made of the rent, for that the rent is incident to the reversion in such case, and not *è converso*, &c. [Sect. 229.] For if a man will grant the rent in such case to another, reserving to him the reversion of the land, albeit the tenant attorned to the grantee, this shall be but a rent-seck, &c. [Sect. 228.]

SECT. DLXXIII. *On confirmation to tenant for life, remainder to another in fee, the latter could not [formerly] sue without making profert of the deed.*—Also, if a man let land to another for his life, and after he confirm by his deed the estate [Sect. 524] of the tenant for life, the remainder to another in fee, and the tenant for life accepteth the deed, then is the remainder *in fait* in him to whom the remainder is given or limited by the same deed. For by the acceptance of the tenant for life of the deed, this is an agreement of him, and so an attornment in law. But yet he in the remainder shall not have any action of waste [Note to Sect. 67] nor other benefit by such remainder, unless that he hath the said deed in hand [Note to Sect. 452] whereby the remainder was entailed or granted to him. And because that in such case the tenant for life peradventure will retain the deed to him, to this intent, that he in the remainder should not have any action of waste against him, for that he cannot come to have the deed in his possession, it will be a good and sure thing in such case for him in the remainder, that a deed indented [Note to Sect. 58 *ad fin.*] be made by him which will make such confirmation, and the remainder over, &c., and that

he which maketh such confirmation deliver one part of the indenture to the tenant for life, and the other part to him that shall have the remainder. [Sect. 370 and note.] And then he by showing of that part of the indenture might [formerly, Note to Sect. 67] have had an action of waste against the tenant for life, and all other advantages that he in the remainder may have in such a case.

NOTE.—As before stated the writ of waste was abolished by the 3 & 4 Will. 4, c. 27, s. 36, and the remedy now is by an action on the case. (Note to Sect. 67.) The old action of waste could have been maintained only by the immediate reversioner or remainder-man in fee or fee tail. (Com. Dig. tit. "Waste," C. 2.) The action on the case substituted in the place of the old writ may be maintained by the remainder-man for life or for years. (2 Will. Saund. 252, 5th edit.; Roscoe's Real Actions, 383.)

SECT. DLXXIV. *Release by one joint-tenant to his companion.*—Also, if two joint-tenants be, who let their land to another for term of life, rendering to them and to their heirs a certain yearly rent; in this case, if one of the joint-tenants in the reversion release to the other joint-tenant in the same reversion this release is good, and he to whom the release is made shall have alone the rent of the tenant for life, and should [formerly, Note to Sects. 67, 573] alone have had a writ of waste against him, although he never attorned by force of such release, &c. And the reason is, for the privity which once was between the tenant for life and them in the reversion.

SECT. DLXXV. *Release in fee by reversioner to remainder-man for life.*—In the same manner, and for the same cause is it, where a man letteth land to another for life, the remainder to another for life, reserving the reversion to the lessor; in this case if he in the reversion releaseth to him in the remainder and to his heirs all his right, &c., then he in the remainder hath a fee, &c.; and he should have had a writ of waste [before its abolition, Note to Sect. 573] against the tenant for life without any attornment of him, &c.

SECT. DLXXXV. *Devisee of rent-charge may distrain.* Also, in ancient boroughs and cities, where lands and tenements within the same boroughs and cities are devisable [Sect. 167] by testament, by custom and use, &c., if in such borough or city a man be seised of a rent service [Sect. 213] or of a rent charge [Sect. 217] and deviseth such rent or service to another by his testament, and dieth; in this case, he to whom such devise is

made, may distrain the tenant for the rent or service are, although the tenant did never attorn.

SECT. DLXXXVI. *On devise of reversion, attornment not formerly required.*—In the same manner is it, where a man letteth such tenements devisable to another for life, or for years, and deviseth the reversion by his testament to another in fee, or in fee tail, and dieth, and after the tenant commits waste, he to whom the devise was made should have had [*formerly*, Note to Sect. 573] a writ of waste, although the tenant did never attorn. And the reason is, for that the will of the devisor made by his testament shall be performed according to the intent of the devisor; and if the effect of this should have depended upon the attornment of the tenant, then perchance the tenant would never have attorned, and then the will of the devisor should never have been performed, &c., and for this the devisee shall distrain, &c., or he might have had an action of waste [*formerly*] without an attornment. For if a man deviseth such tenements to another by his testament, *habendum sibi in perpetuum*, and dieth, and the devisee enter, he hath a fee simple *causâ qua supra* [Note to Sect. 1]; yet if a deed of feoffment had been made to him by the devisor of the same tenements, *habendum sibi in perpetuum*, and livery of seisin were made upon this, he should have an estate but for term of his life.

OF DISCONTINUANCE.

SECT. DXCII. *Discontinuance defined.*—Discontinuance is an ancient word in the law, and hath divers significations, &c. But as to one intent it hath this signification, viz., where a man hath aliened to another certain lands and tenements, and dieth, and another hath right to have the same lands or tenements, but he may not enter into them because of such an alienation, &c. [See Co. Litt. 325 a, where it is said that a discontinuance is in the case of a conveyance by the effect of which the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter; “all which,” adds Coke, “is implied by the description of our author (Littleton) and by the, &c., at the end of the section.”]

NOTE.—A discontinuance was most commonly effected by a tenant in tail (in possession, Note to Sect. 658), but could also have been by parsons seised in right of their churches (Sect. 643; 2 Preston's Abstracts, 304; 3 Black. Com. 172), and by husbands seised in right of their wives. (Sect. 594; 2 Preston's Abst. 304; 3 Black. Com. 172.) The conveyances

which produced a discontinuance were a feoffment; a fine with or without proclamations, a common recovery, not duly suffered, as distinguished from a recovery duly suffered, and operating as a bar; and also a warranty (1 *Crompt. and Jerv.* 528) annexed to some particular species of conveyance. (1 *Prest. Abst.* 368; 2 *Ibid.* 309, 310; *Shepp. Touchst.* 32, note (g), *Atherley*; 4 *Barn. and Adol.* 283; 1 *Nev. and Mann.* 130; *Co. Litt.* 191 a, n. (1), *V. s.* 8, 325 a, n. (1), 325 b, n. (1), 326 b, n. (1), 330 a, n. (1), 332 a, n. (1); *Burton's Comp.* pp. 251, 252, 5th edit.) Now, by 8 & 9 *Vict. c.* 106, a feoffment has not any longer a *tortious* operation, and by consequence will not create a discontinuance, and fines and recoveries were abolished by 3 & 4 *Will. 4, c.* 27; so that now there does not exist any conveyance capable of effecting a discontinuance. By 3 & 4 *Will. 4, c.* 74, s. 14, all warranties of lands are void against the issue in tail, and all persons whose estates are to take effect after the determination, or in defeasance of the estate tail. The effect of a discontinuance by tenant in tail (for as to parsons and husbands, several statutes gave an entry) was to take away the right of entry of the issue and also of the remainder-men and reversioners (1 *Nev. and Mann.* 130), and to put them to their *actions* to recover the estate. And if the tenant in tail levied a fine with proclamations, it took away the action of his issue. But it was enacted by 3 & 4 *Will. 4, c.* 27, that *no discontinuance shall take away an entry.*

SECT. DXCIV. *Discontinuance by husband.*—Also, if a man were seised of land as in right of his wife, &c., and thereof enfeoffed another, &c., and died, the wife could not [*formerly*] have entered, but was put to her action [Note to Sect. 509], the which was called *cui in vitâ*, &c.

NOTE.—By the 32 *Hen. 8, c.* 28, s. 6 (set out, 2 *Bacon's Abr.* 670, 7th edit.), the wife and her heirs after the decease of her husband may enter into the lands or tenements of the wife, notwithstanding the alienation of her husband. (See *Co. Litt.* 326 a; 2 *Preston's Abst.* 304, 328, 335; *Bacon's Abr. tit. "Discontinuance" (C.)*; *Roscoe's Real Actions*, 52; *Burton's Comp. pl.* 220.)

SECT. DXCV. *Discontinuance by tenant in tail.*—Also, if tenant in tail of certain land thereof enfeoffed another, &c., and had issue and died, his issue could not [*formerly*] have entered into the land, albeit he had title and right to this, but was put to his action, which was called a *formedon in le discender*, &c. [See Note to Sect. 592.]

NOTE.—In noticing the conveyances by tenants in tail, it is necessary to bear in mind the provisions of the statute for the abolition of fines and recoveries, &c. (3 & 4 Will. 4, c. 74.) By that statute every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, has full power (subject to certain provisions for protectorship, by which tenant in tail under a settlement, if he wish to bar other than his issue, must obtain the consent of the owner of the first estate of freehold, &c.) to dispose of the lands entailed for an estate in *fee simple absolute*, or any less estate, against all persons claiming under the estate tail, or in respect of any ulterior estate. The disposition may be by any actual assurance (except a will, see Note to Sect. 624) which would have sufficed if the estate had been one in fee simple, and so that it be enrolled in the Court of Chancery within six calendar months after the execution.

SECT. DXCIX. *Feoffment by tenant in tail*.—But by the feoffment of tenant in tail, fee simple [*formerly*] passed by the same feoffment by force of the livery of seisin, &c.

NOTE.—The tortious nature of a feoffment carried a fee, but by 8 & 9 Vict. c. 106, a feoffment has not now any tortious operation, and will pass nothing more than a lease and release or grant will do.

SECT. DC. *Release by tenant in tail*.—But by force of a release nothing shall pass but the right which he may lawfully and rightfully release, without hurt or damage to other persons who shall have right therein after his decease, &c. So there was [*formerly*] great diversity between a feoffment of tenant in tail and a release made by tenant in tail.

SECT. DCVI. *Release by tenant in tail to lessee for years*.—Also, if tenant in tail of certain land lets the same land to another for term of years, by force whereof the lessee hath thereof possession, in whose possession the tenant in tail by his deed releases all the right that he hath in the same land, to have and to hold to the lessee and to his heirs for ever; this was no discontinuance, but after the decease of the tenant in tail, his issue may well enter, because by such release nothing passed but for the term of the life [*but see Note, Sect. 612*] of the tenant in tail.

NOTE.—Leases for years by tenants in tail were not, at common law, binding on the issue, nor would equity compel the issue, though in the enjoyment of large assets, to confirm his ancestor's lease. Then the 32 Hen. 8, c. 28, *enabled*

(4 Bac. Abr. tit. "Leases," D. 2) the making of a lease by a tenant in tail for a period not exceeding twenty-one years, or three lives, with certain very stringent restrictions. These restrictions have, however, been virtually, though not expressly, relaxed, by the 3 & 4 Will. 4, c. 74 (abolishing fines and recoveries, &c.). From the provisions of this Act (see ss. 15, 25, 26, 40, 41, 79), it seems that a lease for years not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease shall be a rack-rent, or not less than five sixth parts of a rack-rent, may be granted by a tenant in tail, without enrolment, under the 3 & 4 Will. 4, c. 74, and without its conforming to the provisions of the 32 Hen. 8, c. 28. Also that leases for any other term granted by a tenant in tail will be supported against the issue in tail, reversioner, and remainder-men, if made by deed and enrolled according to the 3 & 4 Will. 4, c. 74, s. 41. Also that no lease not authorised by that Act, expressly or impliedly, as in the case of the exception just noticed, will be binding upon the issue in tail, unless it comply with the terms of the 32 Hen. 8, c. 28. A lease for three lives, for instance, which, for want of enrolment, may fail of effect under the 3 & 4 Will. 4, c. 27, may be established under the 32 Hen. 8, c. 28. Leases for twenty-one years, or less, but not reserving five-sixths of a rack-rent, may likewise be supported under the old Act, though inoperative under the new one, provided the rent reserved be the accustomed rent. (1 Platt's Leases, 88.)

SECT. DCVII. *Confirmation by tenant in tail of his lessee's estate.*—In the same manner it is, if the tenant in tail confirm the estate of the lessee for years, to have and to hold to him and to his heirs, this was no discontinuance, for that nothing [*in Littleton's opinion*] passed by such confirmation but the estate which the tenant in tail had for term of his life, &c. [See Note to Sect. 612, as to base fee passing.]

SECT. DCXII. *Release by tenant in tail to his lessee for life.*—Also, if tenant in tail grant his land to another for term of the life of the said tenant in tail, and deliver to him seisin, &c., and after by his deed he releaseth to the tenant and to his heirs all the right which he hath in the same land; in this case the estate of the tenant of the land is not enlarged by force of such release, for that when the tenant had the estate in the land for

term of the life of the tenant in tail, he had then [*this is not law*] all the right which tenant in tail could rightfully grant or release: so as by this release no right passeth, inasmuch as his right was gone before.

NOTE.—The correctness of the above section was questioned by Lord Hobart in *Sheffield v. Ratcliffe* (Hob. 338), and by Lord Holt in *Machell v. Clarke* (2 Salk. 619), and it is now held not to be law. Nor is the commentary of Sir Edward Coke correct with reference to the point of abeyance. When a tenant in tail leases for his own life, as he lawfully may, a rightful reversion in tail is vested in him. This reversion, also, he may lawfully grant during his own life, for he is, during that time, entitled to the services of the tenant for life. (*Cholmley's Case*, 2 Rep. 51 a.) The release, then, of all his right, operates as the conveyance of a base fee, determinable on the death of the tenant in tail, and entry of the issue. (*Machell v. Clarke*, 2 Salk. 619; *S. C.* 2 Ld. Raym. 782.) The tenant in tail has consequently no reversion left in him, and could neither bring an action of waste (Note to Sect. 573), nor enter for a forfeiture. (*Co. Litt.* 331 a.) The alienee is seised of a base fee descendible to his heirs, out of which his wife is dowable during the continuance of the fee, and until the entry of the issue in tail. (*Seymour's Case*, 10 Rep. 96 a; 1 Saund. 261 a, note (3); *Park on Dower*, 143.)

SECT. DCXIII. *Grant by tenant in tail to another in fee.*—Also, if tenant in tail, by his deed, grant to another all his estate which he hath in the tenements to him entailed, to have and to hold all his estate to the other and to his heirs for ever, and deliver to him seisin accordingly; in this case the tenant to whom the alienation was made, hath no other estate but for term of the life of tenant in tail. [*This is wrong*, Note to Sect. 612.] And so it may be well proved [*according to Littleton's opinion, but which is erroneous*], that tenant in tail cannot grant nor alien, nor make any rightful estate of freehold to another person but for term of his own life only, &c. [See Note to preceding Section on this doctrine.]

NOTE.—The reader will bear in mind, in reading the above and other sections, what has been before stated (Note to Sect. 595), that by 3 & 4 Will. 4, c. 74, the tenant in tail may now dispose of his estate in fee by any deed sufficient in the case of a conveyance of a fee simple (the protector, where there is one, joining), and the deed being enrolled in Chancery within six calendar months after its execution. Therefore, in the above case, if the conveyance were by

bargain and sale, and duly enrolled, it would pass a fee simple to the bargainee, and not a mere life estate. If not enrolled, then it should seem that a base fee would pass, as stated in the note to the preceding section.

SECT. DCXV. *Grant by tenant in tail in remainder is no discontinuance.*—Also, if land be let to a man for term of his life, the remainder to another in tail, if he in the remainder will grant his remainder to another in fee by his deed, and the tenant for life [*formerly*] attorned [Sect. 551], this was no discontinuance of the remainder.

NOTE.—The reason is that the remainder lies in grant only, and nothing that lies in grant can be the subject of a discontinuance. (*Doe v. Prestwidge*, 4 Mau. & Selw. 178; Co. Litt. 330 a, note; Sect. 598.)

SECT. DCXVII. *Grant of advowson or common by tenant in tail.*—Also, if a man be tenant in tail of an advowson in gross, or of a common in gross, if he by his deed granted the advowson or common to another in fee, this was no discontinuance; for in such cases the grantees have no estate but for term of the life of tenant in tail [Note to Sect. 612] that made the grant, &c.

SECT. DCXVIII. *Of things lying in grant there could be no discontinuance.*—And note, that of such things as pass by way of grant, by deed made in the country, and without livery, there such grant made no discontinuance, as in the cases aforesaid, and in other like cases, &c. And albeit such things be granted in fee, by fine [*before its abolition*] in the King's Court, &c., yet this made not a discontinuance.

NOTE.—The fine operated only as a grant in the case of a tenant in tail in remainder of land, or in possession, or in remainder of an incorporeal tenement. (*Burt. pl. 672.*)

SECT. DCXIX. *Lease for years by tenant in tail, with grant of reversion to another.*—Note, if I give land to another in tail, and he letteth the same land to another for term of years, and after the lessor granteth the reversion to another in fee, and the tenant for years attorn [Sect. 551] to the grantee, and the term expireth during the life of the tenant in tail, by which the grantee enters, and after the tenant in tail hath issue and die; in this case this was even [*formerly*] no discontinuance, notwithstanding the grant be executed in the life of the tenant in tail, for that at the time of the lease made for years, no new fee

simple was reserved in the lessor, but the reversion remained to him in tail, as it was before the lease made. [Sect. 622.]

NOTE.—Lord Coke (1 Inst. 332 b) says that this is an addition; “yet is the case good in law, because neither the lease for years, nor the grant of the reversion, divesteth any estate.”

SECT. DCXXIII. *Gift to a man and his heirs male of his body.*—For if land be given to a man and to his heirs male of his body engendered [Sect. 21], who hath issue two sons, and the eldest son hath issue a daughter, and dieth, and the tenant in tail maketh a lease for years and die, now the reversion descendeth to the younger son, for that the reversion was but in the tail, and the younger son is heir male, &c. [Sect. 23.] But if the tenant had made a lease for life, &c., and after died, the reversion would [*formerly*] have descended to the daughter of the elder brother, for that the reversion was in the fee simple, and the daughter heir general, &c.

SECT. DCXXIV. *Devise by tenant in tail was not a discontinuance.*—Also, if a man be seised in tail of lands devisable by testament, &c. [Sect. 167], and he deviseth this to another in fee, and dieth, and the other enter, &c., this was no discontinuance, for that no discontinuance was made in the life of the tenant in tail, &c.

NOTE.—Estates tail, and in *quasi* entail, have never (except under such custom as is spoken of by Littleton) been devisable, and it is clear that the new Act 7 Will. 4 & 1 Vict. c. 26, does not extend the power of devising to such interests. Still there is nothing in the Act to prevent the operation of a devise by a tenant in tail under a custom, so that it may be sometimes material to ascertain whether, where a tenant in tail makes a devise, there was a custom enabling him to do so. In the absence of such a custom, tenants in tail, in order to acquire a power of testamentary disposition, must take the necessary means for converting their estates into fee simple or absolute estates where that is practicable, or into base or determinable fees. (3 & 4 Will. 4, c. 74; Shelf. Real Prop. Stats. 202, 318, 3rd edit.) For it may be observed, that a person seised of a base fee has the same right to devise it as a person seised of a common fee simple. (*Doe v. Finch*, 1 Nev. and Mann. 130; 1 Shelf. New Will Act, 150.)

SECT. DCXXV. *The estate tail could not be discontinued unless the reversion were.*—Also, if land be given in tail saving

the reversion [Note to Sect. 19] to the donor, and after the tenant in tail by his deed enfeoff the donor, to have and to hold to him, and to his heirs for ever, and deliver to him seisin accordingly, &c., this is no discontinuance, because none can discontinue the estate tail, unless he discontinue the reversion of him who hath the reversion, &c., or remainder, if any hath the remainder, &c. And inasmuch as by such feoffment made to the donor (the reversion then being in him) his reversion was not discontinued nor altered, &c., this feoffment is no discontinuance.

SECT. DCXXVI. *Feoffment to remainder-man was no discontinuance.*—In the same manner is it, where lands are given to a man in tail, the remainder to another in fee, and the tenant in tail enfeoff him that is in the remainder, to have and to hold to him and to his heirs; this is no discontinuance, *causâ quâ suprâ.*

NOTE.—The reason is that the feoffment of tenant in tail to the *immediate* remainder-man or reversioner in fee, has the operation of a surrender. In this light it cannot be considered to pass a greater estate than the grantor may lawfully convey: it did not, therefore, work a discontinuance. (Co. Litt. 335 a, n. (2), by Butler; Peck v. Channell, Cro. Eliz. 827, 828; 1 Prest. Abstr. 407, 408.)

SECT. DCXXXIII. *Husband within age making feoffment of wife's lands.*—Also, if a woman inheritrix hath a husband who is within age [Sects. 104 and 259], and he being within age maketh a feoffment [Note to Sect. 259] of the tenements of his wife in fee, and dieth, it hath been a question if the wife may enter or not, &c. And it seemeth to some, that the entry of the wife after the death of her husband is congeable in this case. For when her husband made such feoffment, &c., he might well enter, notwithstanding such feoffment, &c., during the coverture; and he could not enter in his own right, but in the right of his wife: *ergo*, such right as he had to enter in the right of his wife, &c., this right of entry remaineth to the wife after his decease.

NOTE.—A feoffment by infant (except by custom) is void. (Note to Sect. 259.) But by custom an infant may make a feoffment, by way of sale, at the age of fifteen, and it shall not be defeated. (Burton's Comp. pl. 199 n.; 1 Preston on Abstr. 319; Comyns' Dig. tits. "Enfant," (B. 6) and "Gavelkind;" 9 Jurist, pt. 2, p. 3; 8 & 9 Vict. c. 106, s. 3.) And if such an infant, being tenant in tail, made a feoffment, it was no discontinuance; because the custom will not

enable one to do a tort. (2 Bacon's Abr. 669, 7th edit.; Cro. Jac. 80.)

SECT. DCXXXVII. *An estate tail could not be discontinued by other than tenant in tail.*—Note, that an estate tail could not be discontinued, but there where he that made the discontinuance was once seised by force of the tail, unless it were by reason of a warranty, &c. [*Note to Sects. 592, 658.*]

SECTS. DCXLIII—DCXLVI. *On alienation by parson, successor may enter.*—Also, if a parson of a church, or vicar of a church, alien certain lands or tenements, parcel of his glebe, &c., to another in fee, and die or resign, &c., his successor may well enter, notwithstanding such alienation, as is said in a *Nota*, 2 Hen. 4, *termino Mich.*

As to alienation and leases by ecclesiastical persons, it is enacted by stat. 1 Eliz. c. 19, archbishops and bishops, and by stat. 13 Eliz. c. 10, colleges, deans and chapters, hospitals, parsons, and vicars, are prohibited from alienation (beyond the life, it must be understood, of the incumbent or head of the corporation for the time being), except by way of lease for twenty-one years or three lives (or a less period), whereupon the "accustomed yearly rent or more shall be reserved and payable yearly during the said term." And the leases to which the last of the two statutes relates are further restricted by stat. 18 Eliz. c. 11, which requires that, where any former lease for years is in being, it must be expired, surrendered, or ended, within three years next after the making of the new lease. The stat. 14 Eliz. c. 11, as to houses in towns which are affected by 13 Eliz., extends the term to forty years, but prohibits leases in reversion, and requires the burthen of repairs to be imposed upon the lessee; it also allows of absolute alienation by way of exchange. By stat. 18 Eliz. c. 6, as to leases by colleges in the universities, and those of Winchester and Eton, one-third of the whole rent is required to be reserved in corn, *viz.*, "in good wheat after the rate of 6s. 8d. the quarter or under, and good malt at 5s. the quarter or under."

It is to be observed that, by the common law, archbishops and bishops, although they were held to be seised in fee simple in right of their churches, could make no assurance to bind their successors without the concurrence of the dean and chapter; and that parsons and vicars, though not properly said to be seised in fee-simple, but for their lives only, might bind their successors with the assistance of the patron and ordinary; and as the above statutes are merely

restrictive, they do not enable the parties to dispense with the necessary consent. And it has been decided that a lease made by a perpetual curate of a curacy augmented by the Governors of Queen Anne's Bounty, without the concurrence of the patron paramount (*i. e.*, the patron of the advowson), though confirmed by the ordinary and immediate patron (the rector), is void at common law; and such lease is not set up by acceptance of rent by the successor to the curacy. (*Doe v. Collinge*, 7 Com. Ben. Rep. 939; S. C. 13 Jur. 791.)

There have also been various other statutes than those above mentioned (see 1 Steph. Com. 454, 3rd edit.), placing further restrictions on ecclesiastical leases and the renewals of them, which, however, have been partially relaxed for particular purposes by consent of proper parties. (See 3 Steph. Com. 93—97, 3rd edit.)

SECT. DCXLVII. *Abejance by death of parson.*—Also, if a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is void, but in abejance, viz., in consideration and in the understanding of the law, until another be made parson of the same church; and immediately when another is made parson, the freehold in deed is in him as successor.

NOTE.—Mr. Christian (Note (3) to 2 Black. Com. 107), in speaking of the above section, says that “there hardly seems any necessity to resort to abejance, or to the clouds, to explain the residence of the inheritance, or of the freehold. In the case of the inheritance, the *whole fee simple* is conveyed to a sole corporation, the parson and his successors; but if any interest is not conveyed, it still remains in the grantor and his heirs, to whom, upon the dissolution of the corporation, the estate will revert. And in the case put in the above section, the freehold seems, in fact, from the moment of the death of the parson, to rest and abide in the successor, who is brought into view and notice by the institution and induction; for after induction he can recover all the rights of the church, which accrued from the death of the predecessor.” (See on this, Hovenden's note (10) to 2 Black. Com. 107.)

SECT. DCXLVIII. *Charge of glebe by parson.*—Also, some peradventure will argue and say, that inasmuch as a parson, with the assent of the patron and ordinary, may grant a rent-charge out of the glebe of the parsonage in fee, and so charge the glebe of the parsonage perpetually, *ergo* they have a fee simple, or two or one of them have a fee simple at the least.

To this may be answered, that it is a principle in law, that of every land there is a fee simple, &c., in some body, or otherwise the fee simple is in abeyance. And there is another principle, that every land of fee simple may be charged with a rent-charge in fee by one way or other. And when such rent is granted by the deed of the parson, and the patron, and ordinary, &c., in fee, none shall have prejudice or loss by force of such grant, but the grantors in their lives and the heirs of the patron, and the successors of the ordinary after their decease. And after such charge, if the parson die, his successor cannot come to the said church to be parson of the same by the law, but by the presentment of the patron and admission and institution of the ordinary. And for this cause the successor ought to hold himself content, and agree to that which his patron and the ordinary have lawfully done before, &c. But this is no proof that the fee simple, &c., is in the patron and the ordinary, or in either of them, &c. But the cause that such grant of rent-charge is good is for that they who have the interest, &c., in the said church, viz., the patron, according to the law temporal, and the ordinary, according to the law spiritual, were assenting or parties to such charge, &c. And this seemeth to be the true cause why such glebe may be charged in perpetuity, &c.

NOTE.—As to charges by parson alone, see Note to Sect. 528. It should there have been stated that the 57 Geo. 3, c. 99, has been repealed by the 1 & 2 Vict. c. 106, but without affecting the revival of the 13 Eliz. c. 20.

SECT. DCL. *Right in abeyance on grant of all his estate by tenant in tail.*—In the same manner it is, where tenant in tail grants all his estate to another; in this case the grantee hath [*in Littleton's opinion*] no estate but for term of life of the tenant in tail, and the reversion of the tail is not in the tenant in tail, because he hath granted all his estate and his right, &c. And if the tenant to whom the grant was made make waste, the tenant in tail should not have had a writ of waste [*prior to its abolition*, Note to Sect. 573], for that no reversion is in him. But the reversion and inheritance of the tail, during the life of the tenant in tail, is in abeyance, that is to say, only in the remembrance, consideration, and intelligence of the law.

NOTE.—The above section is not now law. It was supposed by Littleton, that a tenant in tail had power to alien for his own life only, consequently that he could not confer on his alienee a greater estate than an estate *pur autre vie*. But this doctrine has been overruled. (Note to Sect. 612.) It may be laid down that every conveyance (unless, of course,

such as by the 3 & 4 Will. 4, will pass a fee simple absolute, see Note to Sects. 595, 613) by a tenant in tail purporting to pass a fee simple confers a *base fee* on the alienee, which continues as long as the tenant in tail has issue inheritable under the line of entail; and has all the properties of an estate in fee during its continuance (Note to Sect. 612); but this base fee is subject to avoidance by the issue, unless the conveyance be such as would create a bar, or, *formerly*, a discontinuance. (See 1 Preston on Abstracts, 364, 384; 2 Black. Com. 109; Com. Dig. tit. "Estates" (B. 33); 1 Steph. Com. 225; 1 Atkinson's Convey. 25.)

SECT. DCLVI. *Dean and Chapter—Actions.*—But dean and chapter are not dead persons in law, &c., for every of them may have an action by himself in divers cases. And of such lands or tenements as the dean and chapter have in common, &c., if they be disseised, the dean and chapter should [*before its abolition*] have had an assise, and not the dean alone, &c. And if another would have had an action real for such lands or tenements against the dean, &c., he must have sued against the dean and chapter, and not against the dean alone, &c.

NOTE.—If an integral part of an aggregate corporation is in itself a distinct corporation (and though the dean and chapter make a corporation, yet the dean is also a corporation by himself, Com. Dig. tit. "Ecclesiastical Persons," C. 3), and in such distinct capacity is seised or possessed of property, real or personal, an action for an injury done to such property must be brought by such particular member in its distinct corporate capacity. Thus, in trespass by dean and chapter for entering the close of the *dean*, after verdict found for the plaintiffs, it was moved, in arrest of judgment, that the action being brought for the possessions of the dean only, the chapter ought not to join; and for this judgment was stayed. (*Wolley v. Robinson*, Cro. Eliz. 200.)

SECT. DCLVIII. *Feoffment by tenant in tail in remainder was no discontinuance.*—Also, if land be let to a man for the term of his life, the remainder to another in tail, saving the reversion to the lessor, and after he in the remainder disseiseth the tenant for term of life, and maketh a feoffment to another in fee, and after dieth without issue, and the tenant for life dieth, it seemeth in this case that he in the reversion may well enter upon the feoffment, because he in the remainder which made the feoffment was never seised in tail by force of the same remainder, &c. [Sect. 637.]

NOTE.—The reason is because the feoffment was no
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discontinuance, the feoffor not being seised of the freehold in tail in possession: and a discontinuance of an estate tail could only be made by a tenant in tail in possession, though the existence of a term of years prior to the estate tail did not prevent such tenant in tail from creating a discontinuance. (Doe v. Jones, 1 Barn. and Cres. 243; Doe v. Finch, 1 Nev. and Man. 130; S. C. 4 Barn. and Adol. 283.)

REMITTER.

SECT. DCLIX. *Remitter described.*—Remitter is an ancient term in the law, and is where a man hath two titles to lands or tenements, viz., one a more ancient title, and another a more latter title [*a more recent title*]; and if he come to the land by a latter title [*by the more recent title*], yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and more worthy title. And then when a man is adjudged in by force of his elder title, this is said a remitter in him, for that the law doth admit him to be in the land by the elder and surer title: as if tenant in tail discontinued the tail [Note, Sect. 592], and after he disseised his discontinuee, and so dieth seised, whereby the tenements descend to his issue or cousin inheritable by force of the tail; in this case, this is to him to whom the tenements descend, who hath right by force of the tail, a remitter to the tail, because the law shall put and adjudge him to be in by force of the tail, which is his elder title: for if he should be in by force of the descent, then the discontinuee might [*formerly*, Note to Sect. 304] have had a writ of entry *sur disseisin* in the *per* against him, and should have recovered the tenements and his damages, &c. But inasmuch as he is in his remitter by force of the tail, the title and interest of the discontinuee is quite taken away and defeated, &c.

NOTE.—Remitter is where he who hath the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent, and of course defective, title; in this case he is remitted, or sent back, by operation of law, to his ancient and more certain title. (Gilbert's Ten. 129; Mr. Butler's note to Co. Litt. 347 b; 3 Steph. Com. 379; Burton's Comp. pl. 676.) The principal reason for a man's being so remitted is, that he cannot sue or enter upon himself. But there is no remitter where he who comes to the defeasible estate, comes to it by his own act, or his own assent whilst under no disability. Hence, the defeasible estate, to entitle the party to be remitted, must be

made to him during infancy or coverture, or must come to him by descent or act of law; neither is there any remitter where the ancient estate is recoverable neither by action nor by entry. (3 Black. Com. 21; Gilbert's Tenures, 129, and note (51) by Watkins; 2 Prest. Abst. 331, 332.) Blackstone treated remitter as occurring only where there was a mere right of action, whereas it is clear that it extends to the case of a right of entry, and, indeed, now, by the abolition of real actions, it can arise only where there is a right of entry. (Watk. note to Gilb. Ten. 129; 3 Steph. Com. 380, note (1); Mr. Butler's note to Co. Litt. 347 b.) The doctrine of remitter applies to rights under estates tail as well as to rights under estates in fee. (2 Preston on Abst. 331.) The doctrines of remitter (according to Mr. Butler, Co. Litt. 347 b, n. 1) have been greatly modified by the Statute of Uses, and it is said to have been held, that if the freehold be acquired by the Statute of Uses, it cannot cause a remitter, because the statute is express that the party shall have the same estate in the land which he had in the use. (Mr. Butler's note to Co. Litt. 347 b; 1 Sand. Uses, 166, 2nd edit.; Burton's Comp. pl. 678; Co. Litt. 348 b.) To this, as Mr. Burton observes, if it were not useless to contend against authoritative decisions, it might easily be replied, that the statute only determines what estate shall be transferred to and once vested in the party, but does not pretend to guard against the accidents to which that estate may be liable from the circumstances of the recipient. And in the case of Doe dem. Daniel v. Woodroffe (10 Mees. and W. 608; S. C. 12 Law Journ. N. S. Ex. 147; in Equity, 7 Jur. 959; in the Lords, 2 Hou. Lords' Cas. 811; 13 Jur. 1013), that a person entering under an instrument which operates under the Statute of Uses, or a deed to which he is a consenting party, is nevertheless capable of being remitted to any more ancient title he may have, and that a person is remitted *volens volens*. This case shows the great importance of the doctrine of remitter and was decided on the authority of Littleton.

SECT. DCLXVI. *Alienation by husband of wife's land, and they both take lease.*—Also, if a woman seised of certain land in fee taketh husband, who alieneth the same land to another in fee, the alienee letteth the same land to the husband and wife for term of their two lives, saving the reversion to the lessor and to his heirs; in this case the wife is in her remitter, and she is seised in deed in her demesne as of fee [Sect. 471], as she was before, because the taking back of the estate shall be

adjudged in law the act of the husband, and not the act of the wife; so no folly can be adjudged in the wife, which is covert in such case: and in this case the lessor hath nothing in the reversion, for that the wife is seised in fee, &c.

SECT. DCLXVII. *In the case aforesaid, the husband is estopped.*—But in this case, if the lessor would have sued an action of waste against the husband and his wife, for that the husband had committed waste, the husband could not bar the lessor by showing this, that the taking back of the estate to him and to his wife was a remitter to his wife, because the husband is estopped [Sects. 58, 693] to say that which is against his own feoffment, and his own taking back of the estate for term of life to him and to his wife; and yet the lessor hath no reversion, for that the fee simple is in the wife. And so a man may see one thing in this case, that a man shall be estopped by matter in fact, though there be no writing by deed indented or otherwise.

SECT. DCLXI. *The reason of remitter.*—Also, a principal cause why such heir in the cases aforesaid, and other like cases, shall be said in his remitter, is, for that there is not any person against whom he might [*formerly*] have sued his writ of *formedon*; for against himself he cannot sue, and he cannot sue against any other, for none other is tenant of the freehold; and for this cause the law doth adjudge him in his remitter, *scil.* in such plight as if he had lawfully recovered the same land against another, &c. [See Note to Sect. 659.]

SECT. DCLXIV. *Feoffment by tenant in tail to his heir apparent.*—Also, if tenant in tail enfeoff his heir apparent, the heir being of full age [Sects. 104, 259] at the time of the feoffment, and after tenant in tail dieth, this is no remitter to the heir, because it was his folly that being of full age he would take such feoffment, &c. But such folly cannot be adjudged in the heir being within age at the time of the feoffment, &c.

NOTE.—The surest estoppel was that which arose by *fine*, before its abolition; but a feoffment also operates as an estoppel, and will bind the future estate of the feoffor; but, it seems, during his own life only. (Burton's Comp. pl. 83, citing Litt. s. 667; Co. Litt. 265; 3 Term Rep. 371.)

SECT. DCLXX. *Before wife levied a fine she must have been examined.*—And here note, that when anything passed from the wife which is covert of a husband, by force of a fine, as if the husband and wife make consuance of right to another, &c., or

make a grant and render to another, or release by fine unto another, *et sic de similibus*, where the right of the wife should pass from the wife by force of the same fine, in all such cases the wife must have been examined before the fine were taken, because that such fines should conclude such *fèmes coverts* for ever. But where nothing was moved in the fine but only that the husband and wife did take an estate by force of the said fine, this would not have included the wife, for that in such case she should not have been at all examined, &c.

NOTE.—As married women might always have been jointly impleaded with their husbands, it followed that they could join with their husbands in levying fines; but owing to the deception which was frequently practised upon them in this respect, it was directed by the statute *de modo levandi fines*, that if a *fême covert* were one of the parties to a fine, she ought to be first examined by the justices, and if she refused her assent it should not be levied. Although the statute thus positively directed the examination of a married woman, yet, if she were allowed to acknowledge a fine without being examined, it bound both her and her heirs for ever, there being no method of reversing such a fine (*Penne v. Peacock*, Rep. temp. Talbot, 41); for it could not afterwards be averred that she was not examined, the contrary being recorded. (1 Atkinson's Convey. 450, 451.) Fines are now abolished by the 3 & 4 Will. 4, c. 74, by which it is provided that a *fême covert* may dispose as a *fême sole*, by deed, of lands, or of money subject to be invested in the purchase of lands; but her husband must (except in certain instances in which his concurrence is dispensed with, but with a saving of his rights) concur in the deed (Sect. 77), and the deed must be *acknowledged* by her before a judge of one of the superior courts, or a master in chancery, or two commissioners appointed for taking acknowledgments. The judge, &c., must (Sect. 80), before receiving the acknowledgment, examine her apart from her husband, in order to ascertain her free and voluntary consent, in the absence of which the acknowledgment is to be rejected, and the deed becomes, so far as relates to her execution, void.

SECT. DCLXXII. *Remitter to wife, where husband and wife took by entirety.*—Also, if land be given to the husband and to his wife, to have and to hold to them and to the heirs of their two bodies begotten [Sect. 16], and after the husband alien the land in fee, and take back an estate to him and to his wife for term of their two lives; in this case this is a remitter in deed to the husband and to his wife, maugre the husband.

For it cannot be a remitter in this case to the wife, unless it be a remitter to the husband, because the husband and wife are all one same person in law, though the husband be estopped to claim it. And therefore this is a remitter against his own alienation and reprisal, as is said before.

NOTE.—In Watkins' Princ. Convey. (p. 171, 8th edit.) it is said, that this species of tenancy (*viz.*, to a husband and wife) seems to be an exception to the rule that the husband and wife are one person in law; if they are to be considered as one person (it is said), the husband should be able to convey alone, which he is *not* enabled to do. In a case where a copyhold estate was surrendered to A and his wife for their natural lives, *and the life of the longer liver* of them, and they afterwards conveyed to a purchaser in general terms, upon which a question was raised whether that conveyance passed more than an estate for their *joint lives*: the Court held that the purchaser took an estate for the lives of A and his wife, *and the survivor of them*. (Doe v. Wilson, 4 Barn. and Ald. 311.)

SECT. DCLXXX. *No remitter until the freehold comes in possession to him who has the right.*—Also, if the husband discontinue the tenements of his wife, and take back an estate to him for life, the remainder after his decease to his wife for term of her life; in this case there is no remitter to the wife during the life of the husband, for that during the life of the husband the wife hath nothing in the freehold. But if in this case the wife surviveth the husband, this is a remitter to the wife, because a freehold in law [Sect. 448] is cast upon her against her will. And inasmuch as she cannot have an action against any other person, and against herself she cannot have any action, therefore she is in her remitter. For in this case, although the wife doth not enter into the tenements, yet a stranger, which hath cause to have an action, may sue his action against the wife for the same tenements, because she is tenant in law, albeit that she be not tenant in deed.

SECT. DCLXXXI. *Dower of freehold in law.*—For tenant of freehold in deed is he who, if he were disseised of the freehold, might [*formerly*] have had an assise; but tenant of freehold in law [Sect. 448], before his entry in deed, should not have had an assise. And if a man be seised of certain land, and hath issue a son, who taketh wife, and the father dieth seised, and after the son dies, before any entry made by him into the land, the wife of the son shall be endowed

in the land, and yet he had no freehold in deed, but he had a fee and freehold in law, and so note that the *precipe quod reddat* [before its abolition] might as well have been maintained against him that had the freehold in law, as against him that had the freehold in deed.

NOTE.—As to dower of seisin in law, see Notes to Sections 36, 448.

SECT. DCXCIII. *No remitter where estate comes by indenture, &c.*—Also, where the entry of a man is congeable, although that he takes an estate to him when he is of full age for term of life, or in tail, or in fee, this is a remitter to him, if such taking of the estate be not by deed indented [Sect. 58], or by matter of record, which shall conclude or estop him. For if a man be disseised, and takes back an estate from the disseisor without deed, or by deed-poll, this is a remitter to the disseisee, &c.

NOTE.—It is said that a deed-poll is an estoppel (Com. Dig. tit. "Estoppel," (A. 2); 2 Barn. and Adol. 278; 4 Jur. 837; 5 *Id.* 859; 4 Jarm. Convey. by Sweet, 126, 128), but it is clear that a deed-poll does not estop a lessee, grantee, &c., for it is the deed of the lessor, grantor, &c., only. (Com. Dig. tit. "Estoppel," (A. 2); Co. Litt. 363 b.)

SECT. DCXCV. *Remitter by lease to disseisee—Disclaimer, how made.*—Also, if a man be disseised, and the disseisor let the land to the disseisee by deed-poll, or without deed, for term of years, by which the disseisee entereth, this entry is a remitter to the disseisee. For in such case, where the entry of a man is congeable, and a lease is made to him, albeit that he claimeth by words *in pais*, that he hath estate by force of such lease, or saith openly that he claimeth nothing in the land but by force of such lease, yet this is a remitter to him, for that such disclaimer *in pais* is nothing to the purpose. But if he disclaim in court of record, that he hath no estate but by force of such lease, and not otherwise, then is he concluded, &c.

NOTE.—A tenant for a definite term of years does not forfeit his term by orally disclaiming. (*Doe v. Wells*, 10 Adol. and Ellis, 427; Selw. N. P. 719, 11th edit.) This was the section upon which the case of *Doe dem. Daniel v. Woodroffe* (referred to in Note to Sect. 659) was decided. Mr. B. Alderson, in that case (13 Jur. 1018), in reference to what Littleton says concerning the disclaimer *in pais*, said, "In truth, the entry of the party always operates to

restore him to his older and better title, *whatever he may intend to do when he enters.*"

WARRANTY.

SECT. DCXCVII. *Warranty defined.*—It is commonly said that there were three warranties (*scil.*), warranty lineal, warranty collateral, and warranty that commenced by disseisin. And it is to be understood, that before the statute of Gloucester, all warranties which descended to them which were heirs to those who made the warranties, were bars to the same heirs to demand any lands or tenements against the warranties, except the warranties which commenced by disseisin; for such warranty was no bar to the heir, for that the warranty commenced by wrong, *viz.*, by disseisin.

NOTE.—Warranties at the common law were of three sorts, namely, lineal, collateral, and commencing by disseisin; the latter warranty was no bar to the heir, and arose in the case of a disseisin with an intent to alien with warranty, and did not apply to the case of common disseisin. Lineal warranty, it should seem, could only imply an obligation to make recompense in case of eviction to the amount of assets descended; for as the ancestor might have parted with the estate, there was no occasion for it to rebut the claim of the heir. The effect of collateral warranty, on the contrary, was to estop the legal claim of those in remainder or in reversion, on the presumption, it should seem, that they had received no equivalent; hence the warranty of tenant for life effectually barred the remainder-men, if they claimed as heirs to him. But by the 4 & 5 Anne, c. 16, all warranties of tenant for life are void, and all collateral warranties of any ancestor, who had not an estate of inheritance in possession, are also void against the heir; lineal warranties remained as at common law until the late statutes, that is, they bound with assets. To apply the doctrine to estates tail, the collateral warranty of tenant in tail in possession was not avoided by the statute of Anne, and, consequently, if a remainder-man was his heir, he would be barred. As to the issue, it was held they were protected by the statute *de donis*, and were only estopped by warranty with assets; and the reversioner also, it should seem, was in like manner protected by the same statute. (See *Bole v. Harton, Vaughan*, 360.) By recent statutes the effect of warranties may be considered as entirely taken away, and even long before warranties had fallen into disuse, covenants being substituted for them. (See

Noy's Max. 200, note by Byth.) By the 3 & 4 Will. 4, C. 27, s. 39, it is enacted, that no warranty which may be made *after* the 31st December, 1833, shall toll or defeat any right of entry or action for the recovery of land. And by sect. 14 of 3 & 4 Will. 4, c. 74, it is enacted, that all warranties of land which, *after* the 31st day of December, 1833, shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

SECT. DCCXXVII. *Discontinuance and warranty, &c., by doweress void.*—But now, by the statute made 11 H. 7, cap. 20, it is ordained, if any woman discontinue, alien, release, or confirm with warranty, any lands or tenements which she holdeth in dower for term of life, or in tail of the gift of her first husband, or of his ancestors, or of the gift of any other seised to the use of the first husband, or of his ancestors, that all such warranties, &c., shall be void; and that it shall be lawful for him which hath these lands or tenements, after the death of the same woman, to enter.

NOTE.—The Act mentioned in the above section is, except as to lands comprised in any settlement made before the passing of the 3 & 4 Will. 4 c. 74, repealed. (S. 17 of last Act.)

SECT. DCCXXXV. *If the warranty did not descend upon him who claimed the land to which the warranty was annexed, it was no bar.*—Also, a warranty could not go according to the nature of the tenements by the custom, &c., but only according to the form of the common law. For if the tenant in tail were seized of tenements in Borough-English [Sects. 165, 211], where the custom is that all the tenements within the same borough ought to descend to the youngest son, and he discontinued the tail with warranty, &c., and had issue two sons, and died seized of other lands or tenements in the same borough in fee simple, to the value or more of the lands entailed, &c., yet the youngest son should [*formerly*] have had a writ of *formedon* of the lands tailed, and should not have been barred by the warranty of his father, albeit assets descended to him in fee simple from his said father according to the custom, &c., because the warranty descended upon his elder brother who is in full life, and not upon the youngest. And in the same manner it was of collateral warranty made of such tenements, where the warranty descended upon the eldest son, &c.; this would not have barred the younger son, &c.

SECT. DCCXXXVI. *Warranty in case of gavelkind lands.*—In the same manner it was of lands in the county of Kent, that are called gavelkind [Sects. 210, 265], which lands are dividable between the brothers, &c., according to the custom; if any such warranty be made by his ancestor, such warranty shall descend only upon the heir which is heir at the common law, that is to say, to the elder brother, according to the consue of the common law, and not upon all the heirs that are heirs of such tenements according to the custom.

SECT. DCCXLVII. *Corruption of blood did not prevent issue inheriting.*—The warranty always abided at the common law, and the common law was such [*formerly*] that when a man was attaind or outlawed of felony, which outlawry is an attainder in law, that the blood between him and his son, and all others which shall be said his heirs, was corrupt, so that nothing by descent could descend to any that may be said his heir by the common law. And the wife of such a man that is so attaind could not [*formerly*] be endowed of the tenements of her husband so attaind. And the cause is, for that men should more eschew to commit felonies. But the issue in tail as to the tenements tailed was not in such case barred, because he is inheritable by force of the statute, and not by the force of the common law [Notes to Sects. 6, 52]: and therefore such attainer of his father or of his ancestor in the tail shall not put him out of his right by force of the tail, &c.

NOTE.—By 54 Geo. 3, c. 145, no attainer of felony after the 27th of July, 1814, except in high treason, or murder, or of abetting, procuring or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender or offenders during his or their natural lives only, and that it shall be lawful for every person or persons to whom the right or interest of any lands, &c., after the death of every such offender or offenders, should or might have appertained, if no such attainer had been, to enter into the same. By the 3 & 4 Will 4, c. 106, s. 10, after the death of a person attaind, his descendants may inherit, it being expressly enacted that when a person, from whom the descent of any land is to be traced, shall have had any relation who, having been attaind, shall have died before such descent shall have taken place, then such attainer shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attaind, unless such land shall have escheated, in con-

sequence of such attainder, before the 1st day of January, 1834. It is to be observed that the attainted person must have died before the descent took place. The husband's treason will prevent his wife being endowed, but not any other felony. (3 Prest. Abstr. 385.)

LITTLETON'S EPILOGUE.

Now, I have made to thee, my son, three books.

And know, my son, that I would not have thee believe that all which I have said in these books is law, for I will not presume to take this upon me. But of those things that are not law, inquire and learn of my wise masters learned in the law. Notwithstanding, albeit that certain things which are moved and specified in the said books are not altogether law; yet such things shall make thee more apt and able to understand and apprehend the arguments and the reasons of the law, &c., *for by the arguments and reasons in the law a man sooner shall come to the certainty and knowledge of the law.*

QUESTIONS

ON

LITTLETON'S TENURES.

[NOTE.—The portions in brackets, immediately following the different titles, are by way of *index to the work*. The portions in *italic* among the Questions are additions, and are left, for the most part, to be answered by the reader for himself. They are suggested by the other Questions or the text, and are intended to be *suggestive*, and should be considered by the reader.]

FEE SIMPLE [p. 1—6.]

["Heirs" in Conveyances (p. 1)—Descents—Collateral and Lineal Ancestors (p. 2)—Paternal and Maternal Line (p. 3)—Half-blood (p. 4)—Possessio Fratris (pp. 5, 6)—Purchase (p. 6).]

I. [p. 1.]—Define an estate in fee simple. What words in conveyances are necessary in order to give a fee? On a grant to A, "to hold to him and his assigns for ever," what estate passes? What estate does the word "fee," when used alone, signify? Does the rule which applies to conveyances, respecting the limitation of a fee, apply to wills? On a devise to "A," what estate will he take? (*Did this rule apply to wills before the late Wills Act?*)

II. [p. 2.]—If an owner in fee of land die, leaving no issue or father, who will take the land? Will it make any difference whether the deceased purchased or inherited the land? Is it

seisin that makes a man the stock or root of descent? From whom is a descent to be traced? Is there any and what mode by which a person who has inherited land can make himself the root of descent? (*See also Note to Sect. 12.*)

III. [pp. 2, 3.]—Did inheritances formerly ascend to the lineal ancestor? If an owner of land dies without issue, leaving a brother and a father, who will be his heir? Will it make any difference whether the owner acquired the land by purchase or by descent?

IV. [p. 3.]—An owner of land dies without issue or father, will the heirs *ex parte paternâ*, or *maternâ*, inherit? Will it make any difference whether the owner acquired the land by purchase or by descent? If he inherited the lands through his mother, can the heirs *ex parte paternâ* inherit? If through his father, can the heirs *ex parte maternâ* inherit? Can a person who takes by descent constitute himself the root of descent, by any and what limitation in a deed? Can a maternal inheritance be turned to a paternal one in such a way? (*or, vice versâ, see Com. Dig. tit. "Estates," A, citing Co. Litt. 13 a.*) On a limitation to the heirs or heirs of the body of a person taking no estate, how does the land descend? If the person be a woman, and her only child enters and dies without issue, will the heirs *ex parte paternâ*, or *maternâ*, inherit? State how this was formerly, and what has caused the difference. (*See also Note to Sect. 12, and endeavour to understand the matter.*)

V. [p. 4.]—There are three brothers: the middle one is owner of land; he dies without issue, leaving a father, who is his heir? and who, if he had left no father? Suppose the youngest brother died, would there be any difference? Is there any custom which might affect either or both of these cases? How was the descent between brothers formerly traced, and how is it now?

VI. [pp. 4, 5.]—Could relations by the half-blood formerly inherit to each other? Did the rule apply to all kinds of inheritances? Can half-blood now inherit, and, if so, is it in a limited or an unlimited manner? There are two brothers by different *mothers*; one purchases lands, and dies without father or issue, but leaving sisters and other collateral relations: will they all take before the half-brother? Suppose the two brothers are by different *fathers*, and that the brother leaves only uncles, &c., on his father's side: will the half-brother or the uncle be the heir?

VII. [p. 5.]—Is the half-blood now excluded altogether, or merely postponed?

VIII. [p. 5.]—In a case prior to the new Inheritance Act,

on the death of an owner of land his son did not obtain seisin; he died, leaving a sister of the whole blood and a brother of the half-blood: who was his heir? Suppose he did obtain seisin, what was the difference, and what at this time? Could a party taking by descent make himself the root of descent in any and what manner? Can he now do so? Was and is there any, and what, maxim relating to seisin constituting a root of descent? Was seisin equivalent for all purposes of descent to a purchase? (*Note to Sect. 12.*) There are two half-brothers: their father purchases lands and dies; one brother obtains seisin and dies without issue, but leaving a sister; who is his heir? Could the brother who was seised, by any and what means, prevent the half-brother from inheriting previously to his sister. (*See Notes to Sects. 4, 12.*)

IX. [p. 6.]—How is the word “inheritance” applied? Is an estate tail an inheritance? Is it a *particular* estate? What proves that it is so or not? (*See also Notes to Sects. 13, 18, 19.*)

XII. [p. 6.]—What is an estate by purchase? Can a person who inherited an estate make himself a purchaser thereof by limiting an estate to himself or his heirs in a conveyance? Could he do this formerly? Did the obtaining seisin under the old law turn an inheritance which was *ex parte maternâ* into one *ex parte paternâ*?

ESTATE TAIL. [pp. 7—11.]

[General and Special Tail (p. 7)—Heirs Male and Female in Gifts in Tail (pp. 8, 9)—Gifts to Husband and Wife and their Issue (p. 10)—Gift to A and his Heirs Male or Female (p. 10).]

XIII. [p. 7.]—What statute gave rise to estates tail? What were estates before that statute? What kinds of estates tail are there? What must be the subject matter, and what the estate, to make an entail? Can an estate for another's life be entailed? Can copyholds be entailed in general? Is an estate tail a particular estate?

XIV. [p. 7.]—What is an estate in tail general? Why is it called tail general? Tenant in tail general has children by two wives: can they all inherit the estate? What words are necessary to be used in creating an estate tail? On a gift to A and the heirs of his body, what estate does he take?

XV. [p. 7.]—On a gift to a woman and the heirs of her body, what estate does she take? If she marry a second

husband, will her children by both marriages be entitled to inherit?

XVI. [p. 7.].—What is an estate in special tail? On a gift to a man and his wife and the heirs of their two bodies, if the wife die and the husband marry again, will the issue of the second marriage be able to take? Is it necessary in a gift in special tail that the two donees should both take estates?

XVII. [p. 8.].—What was the estate in frankmarriage?

XVIII. & XIX. [p. 8.].—Where the donee or donees in tail die without issue, what is the result? Is an estate tail a particular estate, and how do you show this to be the case?

XXI. [p. 8.].—On a gift to A and his heirs male of his body, what estate is taken, and can female issue inherit?

XXII. [p. 8.].—On a gift to A and his heirs female of his body, what estate is taken, and can male issue inherit?

XXIII. [p. 8.].—On a gift to a man and the heirs male of his body, must the descent be traced entirely through males? (*See also Sect. 24 and note.*) If the donee have issue two sons, and the eldest son inherits, and dies, leaving a daughter only, can she inherit? Do issue in tail take by descent merely?

XXIV. [p. 9.].—Gift to a man and the heirs male of his body: he dies, leaving only a grandson by a deceased daughter; can the grandson inherit?—if not, for what reason? Can the donor re-enter in the lifetime of such grandson? Did the rule of Littleton apply in the case of a gift to the heirs male of the body of A, without A's taking any estate? (*Was the issue taking under such a limitation a purchaser? Was the descent traced from him, and is it so now? And see Note to Sect. 4.*) On a limitation to the heirs male of the body of A, as purchasers (prior to the Inheritance Act), would the grandson in the above case take? Would he take if the limitation were since that statute? (*And see Note to Sect. 4.*) Have the courts shown an inclination to prefer a male claiming entirely through males to a male who is heir general, but claims through females, in any and what cases of limitations to heirs male of the body?

XXVI. [p. 10.].—What estates pass on a conveyance to A and his wife, and the heirs of the body of A? Does the wife take any, and what, estate?

XXVII. [p. 10.].—What estates pass on a gift to A and his wife, and to the heirs of A, which he shall beget on the body of his wife?

XXVIII. [p. 10.].—On a gift to A and his wife, and to the heirs of the body of the wife by A begotten, what estates have A and his wife respectively? On a gift to A and his wife, and

to the heirs which A shall beget on the body of the wife, what estates have A and his wife respectively, and why?

XXIX. [p. 10.]—Gift to A and his heirs which he shall beget on the body of his body: hath the wife any, and what estate?

XXXI. [p. 10.]—Conveyance to A and his heirs male or heirs female: what estate passes? what in the case of a will? By what words may an estate tail be created in a will? Is there any difference in this respect between a deed and a will?

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED. [p. 11.]

[Definition—Special Tail—Only Donees.]

XXXII. [p. 11.]—Upon what gift does a tenancy in tail after possibility of issue extinct arise? Are the donees in special tail called tenants in tail after possibility, &c., after the death of one of them? if so, under what circumstances? Is the survivor called tenant in tail after, &c., during the existence of issue?

XXXIII. [p. 11.]—Gift to A and his heirs begotten on the body of his then wife: is this general or special tail? are husband and wife both donees? and what estates do they take? Where the husband alone takes an estate, does an estate after possibility, &c., ever, and when, arise?

XXXIV. [p. 11.]—Who is said to be tenant in tail after possibility, &c.? Is tenant in tail general ever so called? Are the issue in special ever so called? Can there be a tenancy in tail, &c., of a remainder?

CURTESY. [p. 12; see also p. 15.]

[Definition—Of what Estate (p. 15).]

XXXV. [p. 12.]—When does tenancy by the curtesy arise? (*See also Sect. 52.*) Can it be of an estate tail? Must there be issue born? Must the child be heard to cry? Is such estate peculiar to England? Is there curtesy of copyholds in general? What is there peculiar as to curtesy in gavelkind lands? (*Where does the custom of gavelkind chiefly prevail?—See Sect. 210 and Note to Sect. 265.*) Is the husband entitled to curtesy of a trust or equity of redemption?

DOWER. [pp. 12—17.]

[Described—By Custom—Assignment (p. 14)—Tenancy in Common—Joint-Tenancy—Curtesy (p. 15)—Dower, Issue Inheritable (p. 16).]

XXXVI. [p. 12.]—In what cases does dower arise? Is there dower out of an estate tail? Must the husband have been seised? How much has the wife, in general, for her dower? Must the issue have been capable of inheriting? (*Consider this, and see also Sect. 53, and Note thereto.*) How long does the wife's estate last? Must there have been issue of the marriage, and is it different with curtesy? Was the widow formerly dowable of lands disposed of (without her joining in a fine) by her husband? Is this so now? Can the husband deprive her of her dower by a mere declaration in any and what deed, or in his will? (*Would you insert such a declaration in a conveyance or will without instructions to that effect? See 5 Law Stud. Mag. N. S. 205; Sugd. Vend. & Purch. 222; Sugd. Stats. 260.*) Where the husband devises land, out of which she would otherwise have been dowable, to his widow, is she entitled to dower out of any other of his lands? Will a devise of personal estate, or of land out of which she is not dowable to his widow, affect her right to dower? (*What is the real force of the words "DECLARED by his will?"*) Does the Act enlarge the widow's right of dower in any and what respects? Is a widow entitled to dower out of an equitable estate, or one partly legal and partly equitable? (*Does this meet the ordinary limitation to bar dower? (as to which, see 4 Law Stud. Mag. N. S. pp. 117, 118) if so, why is such limitation continued? See Sugd. Stats. 261; 5 Law Stud. Mag. N. S. pp. 37, 203.*) Is a widow now entitled to dower out of lands of which her husband was never seised? (*Was the old law the same?*) Will the charges, debts, contracts, incumbrances, &c., of a husband be valid against the wife's right to dower? Is this a new provision? (*Under the old law a husband became bankrupt; was his wife entitled to dower and is this so now? See 5 Law Stud. Mag. N. S. pp. 204, 205.*) To what widows does the new Act apply?

XXXVII. [p. 14.]—Is the widow ever entitled to more or less than a third for her dower? What is the widow's right in copyholds called? Does it last for her life, and must her husband have died seised?

XLIII. [p. 14.]—Can the wife enter into her dower without assignment? What is the widow's interest before, and what after, assignment? Are the dowers *ad ostium ecclesiæ* and *ex assensu patris* in use now?

XLIV. [p. 15.]—Is dower usually assigned by metes and bounds? Is the widow of a tenant in common entitled to dower? How is her dower to be assigned to her in such case? There are two joint-tenants; one aliens his share: is it any longer a joint-tenancy, or what is it?

XLV. [p. 15.]—If the husband died a joint-tenant, is his widow entitled to dower?

LII. [p. 15.]—Of what estate is there curtesy? Must the issue be capable of inheriting the estate as heir to the wife? What do you understand by this? Suppose the wife inherited the estate, would her husband be entitled to curtesy? From whom are descents now to be traced? If the wife were tenant in tail, is the husband entitled to curtesy?

LIII. [p. 16.]—Of what estate is there dower? Must there be a possibility that any issue should be able to inherit as heir to the husband? (*Need there be any issue born, p. 13, note.*) What do you understand by this? Suppose the husband inherited the estate, would the wife be dowable, bearing in mind the new Inheritance Act? Gift to A and the heirs which he shall beget of the body of his [then] wife, what estates do A and his wife respectively take? Will the wife be entitled to dower? On such a gift the wife dies without issue, and the husband marries again: will the second wife be entitled to dower? On a devise to a woman and her heirs, but if she die leaving issue, then to her children and their heirs, do the children take by purchase, and is the husband entitled to curtesy?

ESTATE FOR LIFE. [p. 17.]

LVI. [p. 17.]—What is an estate for life? What is a person who holds for the life of another called? What estate does a demise by deed for an indeterminate time pass? Lease to A till the lessor goes to Westminster: what estate has the lessee? Lease to B till the lessor makes J S bailiff of his manor: what estate passes? These cases were determined on feoffments where livery was given: would the decisions be the same now on grants? Is the delivery of a grant equivalent to livery on a feoffment? Will the immediate freehold of lands now pass by a grant?

ESTATE FOR YEARS. [pp. 18—24.]

[Definition—Debt or Distress for rent—Interesse termini—Entry of Lessee (p. 18)—Denying Landlord's Title—Livery—

Lease by Deed (p. 19)—Grants and Feoffments (pp. 20, 21)—Exchanges (pp. 21—23)—Lessee entering after Lessor's death (p. 23).]

LVIII. [p. 18.]-Describe an estate for years. Can the lessor distrain or bring an action of debt for arrears? What is the interest of a lessee before entry called? Is there any difference in this respect where the lease operates under the Statute of Uses? On a bargain and sale for years has the bargainee an estate before entry. (*Has he an estate before such entry for all or for only some and what limited purposes?*) Does the immediate freehold of lands now lie in grant? Has this enactment had any and what (probable) effect as to common law leases? Is it probable that a lease for years containing the word "grant" would give the lessee an estate without entry? Can a tenant who has been let into possession of lands by the owner or who has, with full means of knowledge, acknowledged the latter's title, deny his right to demise? May such a tenant show that the landlord's title has expired? Can he do this though he continues to occupy the premises, under any and what circumstances? Will a deed not actually indented, but purporting to be an indenture, be so considered?

LIX. [p. 19.]-On a lease for years or for life is livery necessary? On a feoffment in fee is livery required? Was a deed always requisite for a lease of incorporeal things? Was this so as to lands? What does the Statute of Frauds require as to leases for any and what period? Is a lease of lands now good without being under seal? What is a feoffment? Is it much used? Do lands now lie in grant as well as in livery? What is the result of this? Is it probable that a feoffment without livery would now pass a fee, the word "grant" being in it? What are the operative words of a feoffment? Is a feoffment required to be evidenced by deed, and is there any exception? (*See also Notes to Sects. 259, 635.*) Would livery alone without any writing formerly pass a freehold? What made a writing necessary? What estate passed if there were no writing? Has a feoffment any tortious operation? Are there any and what cases in which a deed purporting to be a feoffment, and on which livery is given, would be effectual when a grant would be inoperative? Can a freehold be created so as to commence *in futuro*? Grant of lands to A in fee, to hold from Christmas next: is this good? Suppose it was a feoffment, with livery *after* Christmas: would it be good? (*Bear in mind what has been said as to the livery passing the estate.*) Feoffment by an infant to hold from Christmas; he becomes of full age before that time and *after* the time makes livery: is this good?

LXII. [p. 21.]—In what way could a man formerly have had a freehold without livery? Was livery of seisin necessary on an exchange? Must an exchange now be by deed? Is there any exception? Must the parties to an exchange have entered into the lands exchanged in their lifetime? Is it probable that this is not now requisite? How have exchanges been usually made, and was entry then requisite? Must a common law exchange have had the word “exchange”? What was the effect of the use of this word? Does an exchange now imply any condition in law? If one of the parties is evicted can he enter into the lands given by him in exchange?

LXIV. [p. 22.]—Must the estates in exchange be equal? Can fee simple be exchanged for fee tail?

LXV. [p. 23.]—Must the lands in an exchange be of equal value in money? Is it necessary now to use the word “exchange?”

LXVI. [p. 23.]—If lessor die before lessee enter, can the latter afterwards enter on the lands? Feoffment, with letter of attorney to give seisin; feoffor dies before livery is given: what is the result? Was there not an estate at will? Must the attorney to give or receive livery be appointed by deed? What is the effect of the death of the party giving a letter of attorney before it is acted on? Do courts of law after any and what time presume livery?

ESTATE AT WILL. [pp. 24—26.]

[Defined—Emblements—Taking away goods—Feoffment without livery—Repairs (p. 25)—Distress or debt for rent (p. 26).]

LXVIII. [p. 24.]—Describe a tenancy at will. Why is the lessee called tenant at will? Is the lessee entitled to emblements on the determination of his estate in any and what case? Is lessee for years so entitled? Do the courts favour tenancies at will? What circumstances will make such estate to be from year to year? How is the latter determinable?

LXIX. [p. 25.]—Can tenant at will enter to take away his goods after his tenancy is at an end? Can the executors of tenant in fee, tail, or for life do so?

LXX. [p. 25.]—On a feoffment without livery what estate passed? (*See also Note to Sect. 59.*) If the feoffment contained the word “grant” and was delivered to the feoffee, what estate would now (probably) pass?

LXXI. [p. 25.]—For what repairs is a tenant at will liable? What is the usual remedy for waste? (*See also Note to Sect. 573, p. 101, where the reference to Note, Sect. 67, is erroneous.*) What is the remedy against a bailee destroying the goods delivered to him, and what for a mere injury thereto?

LXXII. [p. 26.]—How is the rent on a tenancy at will recoverable? Can a yearly rent be reserved on a tenancy at will?

COPYHOLDS. [pp. 26—28.]

[Definition—Alienation (p. 27)—Evidences of Title (p. 28).]

LXXIII. [p. 26.]—What is a tenancy by copy of court roll? Can copyholds be entitled without a custom? Limitation of a copyhold to A and the "heirs of his body:" what estate has A? Are the words "at the will of the lord," essential to copyholds? What are customary freeholds?

LXXIV. How must a copyholder alien? What is the form of a surrender by copyholder? What interest would a release or grant by a copyholder pass? How will equitable interests in copyholds pass? Was a surrender to the use of a copyholder's will required in any and what case? and is it now requisite? How can an estate tail in copyholds be barred? Is there any difference between a legal and an equitable entail?

LXXV. [p. 28.]—Why are copyholders termed tenants by copy of court roll? What are the proper evidences of title to copyholds?

TENANT BY THE VERGE. [pp. 28—30.]

[Definition—Customs of Manors (p. 28)—Freehold in Lord—Tenancy at will—Full age (p. 29).]

LXXXIII. [p. 29.]—What is a tenancy by the verge? What customs in manors are allowed? Have copyholders of inheritance the freehold in them? In whom is the freehold? Is it the same as to customary freeholds? *See Note to Sect. 73, p. 27.*) What differences are there between a copyholder and a tenant at will in ordinary cases? Grant of freeholds to hold to the grantee and his heirs at the will of grantor: what estate passes?

CIV. [p. 29.]—What is full age? What is the age of discretion? What is the age for consenting to matrimony? What is the consequence of a marriage under that age? Is the consent of parents or guardians required to the marriage of an

infant? If not given, what is the result? (*Did not the absence of the consent formerly avoid the marriage?*)

SOCAGE. [pp. 30, 31.]

[Definition—Rent-service—Guardianship (p. 30).]

CXVII. [p. 30.]—What is tenure in socage? Are there now any other tenures? May a father appoint guardians to his children, and how? May the mother do so? What statute abolished the military tenures?

CXXII. [p. 30.]—What is rent-service?

CXXIII. [p. 30.]—What is guardianship in socage? Under what age must the infant be? Must the lands have descended to the infant? Who is entitled to be such a guardian? Until what age does the guardianship last? Must the guardian account? How is he to be compelled to account? Does the appointment by the father of a guardian prevent guardianship in socage? What power have such appointed guardians? (*See also Sect. 323, Note, ad fin., p. 65.*)

FRANKALMOIGN. [pp. 31, 32.]

CXXXIII. [pp. 31, 32.]—What is the tenure in frankalmoign? What persons now hold by this tenure?

PETIT SERJEANTY. [p. 32.]

CLIX., CLX., & CLXI. [p. 32.]—What is the tenure by petit serjeanty? Of whom must the holding be?

TENURE IN BURGAGE. [pp. 32—37.]

[Defined (p. 32)—Boroughs—Borough-English (p. 33)—Devise—Husband granting to Wife (p. 34)—Superstitious Uses—Custom and Prescription (pp. 35, 37).]

CLXII. & CLXIII. [pp. 32, 33.]—What is tenure in burgage? Of whom must the holding be?

CLXIV. [p. 33.]—What says Littleton concerning boroughs? (*See also Sect. 171, p. 37.*)

CLXV. [p. 33.]—What is the custom of Borough-English? How does the land descend? Does the custom extend to brothers and other collaterals?

CLXVI. [p. 33.]—What lands is a widow, by custom, entitled to for her dower?

CLXVII. [p. 34.]—Could lands of burgage tenure be devised before other lands were devisable? What was formerly the power which a man had to devise? What property may now be devised, and by what authority? Can customary freeholds and copyholds be devised without surrender, and before admittance? Can contingent interests and rights of entry be devised? Will real estates, acquired after the execution of a will, pass thereby? (*See as to the effect of the words, "of which I am now seised."* *Cole v. Scott*, 16 *Law Tim.* 259; *S. C.* 14 *Jur.* 25; *Stokes v. Salomons*, 15 *Jur.* 483.)

CLXVIII. [p. 34.]—Can a husband grant at law to his wife, by any and what means? Can he surrender a copyhold to her, or devise freeholds to her? Can a man have two valid wills?

CLXIX. [p. 35.]—On a devise that executors sell lands, can they make a title without the heir? Is a devise to sell and apply the proceeds in saying masses for the testator's soul valid?

CLXX. [p. 35.]—What is custom, and what prescription? What is time out of mind in the law? Did the courts presume an immemorial usage without full proof? What is now the time which enables a party to acquire rights *à prendre*, and by what statute? Can a right so gained be defeated in any and what way? What is the extreme length of time? What are the periods constituting a prescriptive right in cases of ways, easements and waters? What for lights? What mode of enjoyment will defeat these rights? What provision is there, as to ways and waters, when there has been an interest in the land for life, or for a term exceeding three years?

VILLENAGE. [pp. 37—39.]

[Advowson—Bastard (p. 37)—Outlawry—Alienage—Parson—Gavelkind—Borough-English (p. 38).]

CLXXXIV. [p. 37.]—What things are regardant and what appendant to a manor?

CLXXXVIII. [p. 37.]—Can a bastard be heir to any one?

CXCVII. [p. 38.]—Can outlawry be pleaded to an action, and how?

CXCVIII. [p. 39.]—Can an alien enemy sue? Can an alien *amoy* resident abroad bring an action?

CCII. [p. 38.]—Is there any maxim in the law as to the indelibility of holy orders?

CCX. [p. 38.]—Where does the custom of gavelkind prevail? What is the custom as to descents of gavelkind lands?

CCXI. [p. 38.]—What is the custom of Borough-English as to descents?

RENTS. [pp. 39—45.]

[Rent-Service—Distress (p. 40)—*Quia emptores terrarum* (p. 40)—Rent-Seck—Rent-Charge (p. 42)—Extinguishment—Apportionment (p. 43).]

CCXIII. [p. 39.]—How many and what sorts of rents are there? What is rent-service? Out of what must rents issue? Can rents be reserved on leases of tithes, &c., and by whom?

CCXIV. [p. 39.]—Can a distress be had for rent-service without any contract to that effect? Must a grant in tail or lease for life be by deed?

CCXV. [p. 40.]—Can there be a rent-service without a reversion? Where a man reserves a rent and retains no estate, what is the rent called? May it now be distrained for?

CCXVI. [p. 40.]—On a feoffment in fee, prior to the statute of *Quia Emptores*, &c., reserving a rent, what was that rent called? and could there be a distress for it? What did that statute enact? What has been its effect? Where an owner in fee grants in tail, for life, &c., of whom does the grantee hold? Where the reversion is, in such a case, granted over, of whom do the grantees hold?

CCXVII. [p. 41.]—On a grant in tail, or for life, &c., the remainder over in fee, with reservation of a rent to the grantor: what is such rent called? What if there be an express clause of distress? Can there now be a distress for a rent-seck: by any and what statute? Lessee for years assigns his term, reserving rent, but no power of distress: can he distrain?

CCXVIII. [pp. 41, 42.]—An owner of land grants a yearly rent thereout, with a clause of distress: what is such rent called? If no clause of distress, what is it called? And can there be a distress in this last case? Will a reservation in a will of a rent-charge, without any clause of distress, entitle the grantee to distrain? On an assignment of his term by a lessee, reserving a rent but no power of distress, is this strictly a rent?

CCXXII. [p. 42.]—If the grantee of a rent-charge purchase a portion of the land out of which the rent-charge issues, what is the effect? (*Would a court of equity give relief in such a case? See Com. Dig. tit. Chancery, 4 N. ; 1 Story's Equity Jurispr. pl. 475.*)

CCXXIII. [p. 43.]—If a person having a rent-service purchase part of the land out of which it issues, what is the effect?

CCXXIV. [p. 43.]—If a portion of the lands descend to the grantee of the rent-charge, what will be the consequence?

CCXXV. [p. 43.]—Where the owner of a rent-service grants it to another, reserving to himself the reversion, what is such rent called? (*See also Sect. 225.*) Was a seisin of a rent formerly required before distraining? How was this seisin obtained? Has there been any, and what, statute rendering attornment unnecessary? On a lease by a remainder-man, has the lessee an estate without entry? Suppose a rent-charge was created before the statute, must a seisin of it be shown?

CCXXVII. [p. 44.]—A rent-service is severed from the reversion: what is it called? Can it be distrained for? Can it be recovered by an action of debt?

CCXXVIII. [p. 44.]—Grant of rent-service, reserving to grantor the reversion: what is such rent? (*See also Sect. 225.*) What if the reversion be also granted?

CCXXIX. [p. 44.]—What will pass by a grant of a reversion? Will a reversion pass by the grant of rent-service? What maxim is there as to the principal and the accessory?

COPARCENERS. [pp. 45—51.]

[Definition (p. 45)—Several Women—Partition (p. 46)—Rent for Equality of Partition (p. 48)—Tenants in Tail and Married Women (p. 49)—Infant (p. 50).]

CCXLI. [p. 45.]—What sort of parceners (usually called coparceners) are there? What are coparceners by the common law? Why are they called coparceners? Do they make one heir? What is the consequence of this doctrine as to copy-holds? Have coparceners both a joint and a several seisin? How can they convey to each other? If one dies, does the coparcener surviving take the deceased's share? (*See further as to this Sect. 280 and Note.*)

CCXLII. [p. 45.]—Are sisters or daughters only called coparceners? If there be but one daughter, is she called a coparcener?

Does she hold in severalty? Can an estate limited to a man and the heirs of his body descend to his sisters?

CCXLIII. [p. 46.].—Are there several and what ways of making partition? Can there be a partition by agreement? Must it be under seal? Is this so in equity? (*See further Note to Sect. 250.*) How are the shares allotted on a partition held? If there be three coparceners and one aliens, what is the effect? (*See further Sects. 276, 309.*) Is the effect the same as to joint tenants? (*See further Sect. 294.*)

CCXLIV. [p. 46.].—On partition by agreement, who has first choice in the absence of an express agreement to the contrary? Did this apply to the abolished writ of partition?

CCXLV. [p. 47.].—What is the eldest sister's part called?

CCXLVII. [p. 47.].—Could a partition formerly be made by writ? Can it now be so made? How is partition usually compelled? Can a partition be had of copyholds? Is the consent of the lord necessary?

CCL. [p. 47.].—Must a partition by agreement be by deed? Is there any, and what, exception? Will a parol agreement for partition be enforced in equity?

CCLI. [p. 48.].—Where the lands assigned are of unequal value, what is usually done? (*The inequality may be, and is, more usually compensated by a sum of money paid down on the execution of the partition deed.*) Can commissioners of partition in equity award sums to be paid for equality of partition?

CCLII. [p. 48.].—Can a distress be had for rent for equality of partition, though not expressly given? Can a fee exist in such a rent without words of limitation?

CCLIII. [p. 48.].—What is a rent for equality of partition called? If such rent be granted to two, how will they hold it? Why cannot such rent be a rent-service?

CCLIV. [p. 49.].—Who are coparceners by the common law? (*As to the other sort of parceners, who are males, see post, see Sect. 265, p. 51.*) If several women purchase land, what are they called?

CCLV. [p. 49.].—Can a partition by owners in fee simple be avoided for inequality? Is it the same as to tenants in tail? (*Should the conveyance be enrolled under the Fines and Recoveries Abolition Act?*)

CCLVI. [p. 49.].—Where the husbands and wives make a partition, will it be void, or only voidable, if unequal? Will this be so in the lifetime of the husband? Will any, and what, acts of the wife after her husband's death amount to a confirmation?

CCLVII. [p. 50.].—If the partition be equal, will it bind the wife? (*Should not she be a party to the deed, and acknowledge it*

under the Fines and Recoveries Abolition Act? In Maden v. Vevers, 5 Beav. 503, no fine was levied; see 1 Atk. 541, per Ld. Hardwicke, explained in 6 Jarman's Convey. by Sweet, p. 592; also Co. Lit. 171 a, Note 2.)

CCLVIII. [p. 50.]—Will an equal partition bind an infant? Will it, if unequal? Will assent after age be effectual?

CCLIX. [p. 50.]—When is a person of full age? What conveyances of an infant are void and what voidable only? Is a voidable deed valid until expressly avoided?

COPARCENERS BY CUSTOM. [pp. 51, 52.]

CCLXV. [p. 51.]—Who are coparceners by custom? How do gavelkind lands descend? Could such coparceners formerly have had a writ of partition before its abolition? Must the custom of gavelkind be mentioned in the pleadings? (*There is a distinction, which will be noticed in Coke's Comment.*) Where does the custom exist? Have there been any disgavelling statutes?

CCLXXVI. [p. 52.]—If there be three coparceners, and one will have a partition, how do they hold? Was it the same under a writ of partition before its abolition?

JOINT TENANTS. [pp. 52—59.]

[Definition—Survivorship (pp. 52—54)—For Life with several Inheritances (pp. 54—56)—Rent-charge and Devise by one (p. 56)—Seised *per my et per tout* (p. 57)—Lease by one (pp. 57, 58)—Partition (p. 58)—Grant to Husband and Wife and a third person (p. 58).]

CCLXXVII. [p. 52.]—Who are joint tenants? If one of two joint tenants dies, who takes his share? Is this so with coparceners? There are two coparceners: one dies, leaving a son; who will take her share? and in what proportions? In the case of a coparcener in tail, how is the descent traced?

CCLXXXI. [pp. 53, 54.]—Does survivorship take place in the case of chattels? Will a trust of a term in joint-tenancy go to the survivor? Does survivorship take place among partners for commercial purposes? In whom does the interest of the deceased partner in the stock in trade vest? Who can bring actions in respect thereof?

CCLXXXII. [p. 54.]—If a bond be made to several, who

must sue thereon? (*Does the survivor alone take beneficially the money recovered?*)

CCLXXXIII. & CCLXXXIV. [pp. 54, 55.]—Can there be joint tenants for life with inheritances in severalty? Conveyance to two *men* and the heirs of their two bodies: what estates have they? What is taken by the survivor? Can the donor enter into a moiety on the death of one of the donees without issue (*the entail not having been barred*)? On a conveyance without any limitation of the estate, with livery, what estate passed? (*Would this now probably be the same on a grant on which livery would not be requisite? See Note to Sect. 56, p. 17; also pp. 20, 21.*) On a devise to testator's daughters and their heirs, and, for want of such issue, over in fee: what estates will the daughters take?

CCLXXXV. [pp. 55, 56.]—Conveyance to A and B for life, with remainder to the heirs (*or* heirs of the body) of A: what estates do they take? If A die, living B, what estate has the latter? Could A grant his remainder in any, and what, way? Can an estate of freehold and for years stand in jointure? Conveyance to A and B, *habendum* to A for life, and to B for years: are they joint tenants?

CCLXXXVI. [p. 56.]—If one joint tenant grant a rent-charge out of a moiety of the lands, will it be good for any, and what, time? Is it the same with parceners? (*Contrast the case of the lease by the joint tenant, Sect. 289, pp. 57, 58.*)

CCLXXXVII. [p. 56.]—Can a joint tenant devise his share? Is it the same with coparceners?

CCLXXXVIII. [p. 57.]—How is each joint tenant said to be seised? What is the real meaning of the expression, "*per my et per tout?*" Does it apply also to tenants in common and coparceners? (*See p. 145, at bottom.*)

CCLXXXIX. [p. 57.]—Will a lease by a joint tenant of his moiety be binding on the survivor? How is the difference between the case of the rent-charge in Sect. 286 and this case of the lease to be explained? What is the effect of a lease by a joint tenant not confined to his moiety?

CCXC. [p. 58.]—Can joint tenants make partition? Must the partition be by deed in every case?

CCXCI. [p. 58.]—On a joint gift to husband and wife and a third person, what shares do the parties take? Are husband and wife accounted as one person? Suppose the gift were to the husband and wife and the third person as tenants in common, would it make any difference? Does the rule apply also to personal estate?

TENANTS IN COMMON. [pp. 59—65.]

[Definition—Gifts by Joint Tenants (p. 59)—Two holding in moieties (p. 60)—Releases (p. 61)—Actions by (p. 62)—Partition—Chattels (p. 63)—Ejectment (p. 63)—Trespass (p. 64).]

CCXCII. [p. 59.]—Who are tenants in common? Have they several or one title? How is their occupation to be? A and B are joint tenants; A aliens his moiety to C: are B and C joint tenants?

CCXCIV. [p. 59.]—A, B, and C are joint tenants; A aliens his share to D: are B, C, and D joint tenants? Is there any right of survivorship among them?

CCXCV. [p. 59.]—A and B are joint tenants in fee; A gives his share to Y in tail, and B gives his share to Z in tail: are Y and Z joint tenants?

CCXCVIII. [p. 60.]—Conveyance to A and B, *habendum* the one moiety to A and his heirs, and the other moiety to B and his heirs: is this a tenancy in common? Is not the *habendum* repugnant to the premises, and so void? Have joint tenants and tenants in common both an undivided right of possession?

CCXCIX. [p. 60.]—Grant by A to B in fee of a moiety of his lands at X: are A and B joint tenants?

CCC. [p. 60.]—A and B are joint tenants in fee; A lets his share to Y for life, and B lets his to Z: are Y and Z tenants in common?

CCCI. [p. 60.]—A and B are lessees for their lives; A grants all his estate to Z: are B and Z tenants in common, and for what period?

CCCIV. [p. 61.]—A, B, and C are joint tenants; A releases to B all his right: are B and C tenants in common, in the whole or in part? What is the usual mode of conveyance from one joint tenant to another? Can tenants in common release to each other? What makes the difference? (*Would a release from one tenant in common to his companion be good now—that is, would it not be construed to be a grant?*) Can tenants in common grant to each other? What privity is there between tenants in common?

CCCV. [p. 61.]—How do releases enure and take effect? Grant to husband and wife and a third person; the third person releases all his right to the husband [or the wife]: what does the husband [or wife] take thereby?

CCCIX. [p. 61.]—A and B are co-parceners; A aliens her share to C: what are B and C?

CCCXI. [p. 62.]-In what cases must tenants in common bring several actions? Is it the same with joint tenants?

CCCXV. [p. 62.]-Can tenants in common join in an action of trespass for an injury done to their property?

CCCXVI. & CCCXVII. [p. 62.]-If tenants in common join in a lease with one reservation, can they jointly sue the lessee? Must they join in an avowry for such rent?

CCCXVIII. [p. 62.]-Can tenants in common make a partition? Can they be compelled to do so? Does a partition revoke a prior will? Can a partition be made if one of the tenants in common has leased his part?

CCCXIX. [p. 63.]-Can there be tenants in common of chattels? Lease for years to A and B; A grants his interest in the term to Z; what are B and Z?

CCCXXI. [p. 63.]-Is there any survivorship in a tenancy in common of chattels?

CCCXXII. [p. 63.]-If one tenant in common eject the other, can the ejected party maintain an ejectment? What is such an act as will entitle the party to bring such action?

CCCXXIII. [p. 64.]-Can one tenant in common maintain trespass *quare clausum fregit* against his companion, under any and what circumstances? Where the chattels held in common are taken by one, can the other maintain trespass in trover? Will it make any difference if the article be destroyed, or be merely sold to a third party? Two persons are testamentary guardians of an infant; one takes the infant away from the other: will an action lie?

ESTATES UPON CONDITION. [pp. 65—80.]

[Conditions in Deed and in Law—Entry for Non-payment of Rent (pp. 65, 66)—Entry till Satisfaction (p. 67)—What words make a condition (pp. 67, 68)—Mortgages (pp. 68—72)—Payment of Rent and Mortgage Money (pp. 72, 73)—Reserving Rent to Stranger (p. 73)—Who can have Benefit of Condition to Re-enter (p. 74)—Escheat (p. 75)—Relief against Forfeitures (p. 76)—Conditions Restraining Alienation (pp. 76, 77)—Counterparts (p. 77)—Conditions in Law (p. 78)—Husband and Wife—Devise to Executors to Sell (pp. 79, 80).]

CCCXXV. & CCCXXVI. [p. 65.]-What are the conditions annexed to estates? What are conditions in deed? Lease reserving a rent, with a condition of re-entry on non-payment: if the rent be not duly paid, may the lessor enter? On a conveyance in fee reserving a rent, with a clause of re-entry on default, can the grantor re-enter? Lessee assigns his term, reserving to

himself a re-entry in case of a breach of covenant : can he re-enter ? Before a re-entry is made for non-payment of rent, is any and what demand necessary ? Can the parties dispense with this demand ? Suppose a lease to give a right of re-entry for breach of a covenant in the lease, and that the covenant to pay rent is broken, can there be a re-entry without a demand ? (*The truth is that leases almost always give a re-entry for non-payment of rent in particular, and then go on in general terms to speak of breaches of covenant ; so that the latter would be construed not to apply to a breach arising from non-payment of rent. This is worthy of the consideration of the practitioner as well as of the student.*) Must a lessee seek out the lessor in order to pay him the rent ? Where there is no sufficient distress on the premises to cover a half-year's rent, is any demand necessary ?

CCCXXVII. [p. 67.]—On a condition to re-enter and hold the premises until the rent is satisfied out of the profits, must the landlord account for the profits ? Is a demand required before entering under such a condition ?

CCCXXVIII. & CCCXXIX. [p. 67.]—Do the words “upon condition,” “provided always,” and “so that,” make an estate upon condition ?

CCCXXX. & CCCXXXI. [p. 68.]—Will the words “if it happen” make a condition in any and what case ? Must these words be followed by a clause of re-entry ? Is this so with the previous words ? May a lessor distrain for rent in arrear on a lease without any clause to that effect ?

CCCXXXII. & CCCXXXIII. [p. 68.]—What is a mortgage ? Is the land forfeited in equity by non-payment of the money ? Is a mortgage in fee personal estate ? In whom does the legal estate vest ? What is the more modern form of a mortgage ? Where the mortgage deed provides that the estate shall be void on payment of the money, will it cease on payment ?

CCCXXXIV. [p. 69.]—Where the payment is to be by the mortgagor, if he die before the day may his heir tender the money ? How is the usual clause, that the mortgagor shall continue in possession until default of payment, construed ? Can a yearly rent be reserved on a tenancy at will ?

CCCXXXIX. [p. 70.]—To whom does the mortgage-money belong on the mortgagee's death intestate ? Is it part of the personal or real estate of the mortgagee ? Where the deed directs the money to be paid to the mortgagee's heir or executor, will a payment to the heir be good under any and what circumstances ?

CCCXL. [p. 71.]—Must the mortgage money be paid to

the mortgagee in person ; or is it sufficient to tender it on the land, where no place is appointed ? Will a tender at the mortgagee's house, though he is not at home, suffice ?

CCCXLI. [p. 72.]—Is a tender of rent on the land sufficient to prevent a re-entry, where no place is specified ? Will it be sufficient to prevent an action for the non-payment ?

CCCXLII. Is it advantageous to a mortgagor to have a place for payment named ? Where no place is mentioned, can the mortgagor appoint a place for payment under any and what circumstances ?

CCCXLIII. [p. 73.]—Where a place is appointed for payment, is the mortgagee bound to attend elsewhere to receive the money ? (*This seems to be the real meaning of Littleton—Would tender to the mortgagee in another place at the day be sufficient ?*)

CCCXLVI. [p. 73.]—Can a rent on a lease be reserved to a stranger ? Is this so with the Queen ? If two joint tenants lease and reserve a rent to one of them, is this good ? How will such reservation enure where not by indenture, and where so ? Does rent follow the reversion in general ? Is an indenture an estoppel ?

CCCXLVII. [p. 74.]—Can a re-entry, in respect of a forfeiture on a lease, be given to a stranger ? Can such re-entry be assigned by any and what statute to a grantee of the reversion ? Is rent incident to the reversion ? Can a re-entry, in respect of matters happening before the assignment, be assigned ? (*The case of Hunt v. Bishop, referred to ante, p. 75, in doubtful terms, has been the subject of discussion in the case of Hunt v. Remnant (22 Law Tim. Rep. 350), where, however, the Court of Exchequer Chamber gave no direct opinion on the point ; but held, that if a right of entry for breach of condition can pass by assignment there must be express words for that purpose.*)

CCCXLVIII. [p. 75.]—Can the lord taking the reversion enter on the lessee for breach of condition ? Can he distrain for rent in arrear ? What is the general rule as to the rights of the lord by escheat ? Is the land in the lord's hands liable to the late owner's debts or other charges ? (*See, in addition, Hughes v. Wells, 16 Jurist, 928, 932.*)

CCCLI. [p. 76.]—Where a party has a right of entry in a freehold, has he the legal estate before entry ? Is this the case with a leasehold estate ? In what cases of forfeiture will courts of equity relieve ? Can proceedings at law for a forfeiture be stopped by any and what means ?

CCCLX. [p. 76.]—On a conveyance in fee, is a condition against alienation good ? Is such a condition good in a lease

for years? Is a condition against alienation accompanied with a gift over, on breach, valid?

CCCLX. [p. 77.]—Do all the parts of an indenture form but one deed? What is that part which is executed by the grantor called, and what that executed by the grantee? Where all the parts are executed by all the parties, what are they called, and how to be stamped? Is it necessary that a deed, purporting to be an indenture, should be actually indented?

CCCLXI. [p. 77.]—Is a condition restraining alienation to a particular individual good?

CCCLXXVIII. & CCCLXXIX. [p. 78.]—What are conditions in law? What condition is implied in the grant of an office, as the parkership of a park?

CCCLXXIV. [p. 78.]—Is a person taking a remainder under a deed which he has not executed bound by the conditions therein?

CCCLXXX. & CCCLXXXI. [pp. 78, 79.]—Can estates be granted upon condition in law? Lease to husband and wife to hold during the coverture between them: what estate have they? Is this not rather a limitation than a condition? Would the estate be put an end to by a divorce of any, and what, kind? What is a divorce *à vinculo* for, and what *à mensâ et thoro*? Does either, and which, of them bastardize the children?

CCCLXXXIII. [p. 79.]—Does a direction in a will that the executor shall sell the testator's land, give the executor an estate? Who may take the profits until the sale? When the land is devised to the executor to be sold, does the heir take any estate?

DESCENTS TOLLING ENTRIES. [pp. 80—82.]

[Old doctrine—Coparcener's Entry (p. 81)—Lunatic disabling himself (pp. 81, 82).]

CCCLXXXV. [p. 80.]—What descents formerly tolled entries? Does the law cast lands upon the heir without entry? (*See also Sect. 448.*) Will a descent now toll an entry? What is the meaning of "tolling?"

CCCXCVIII. [p. 81.]—Was the entry of one coparcener the entry of her companions? But suppose both entered, and one then dispossessed the other, was the possession of the one that of the other? What provision has been lately made, and by what statute, as to this subject? (*Should not the proposition of Mr. Serjeant Manning (ante, p. 57) be confined, at least as to tenants in common, to the possession or right of occupation?*)

CCCCV. [p. 81.]—Can a man be heard to allege his own lunacy? May his heir do so? Would lunacy be a good defence to an action upon a contract made while lunatic, and what must be shown?

CONTINUAL CLAIM. [pp. 82, 83.]

CCCCXIV. [p. 82.]—What was continual claim, and its effect? Is such a claim of any effect now? Will a mere entry now be of any effect in staying the running of the Statute of Limitations?

RELEASES. [pp. 83—92.]

[Of a right (pp. 83—85)—Freehold (p. 85)—To reversioner (p. 87)—To lessee before entry (p. 87)—By enlargement (pp. 87, 88)—By *mitter le droit* (p. 89)—Words of limitation (pp. 89, 90)—By extinguishment (p. 90)—Release of actions and demands, &c., (pp. 90—92) of rents (p. 92).]

CCCCXLIV. & CCCCXLV. [p. 83.]—What sorts of releases are there? What is the form of a release of a right in lands?

CCCCXLVI. [p. 84.]—Will any future right pass by a release? (*Might not such release be effectual as a covenant or be enforceable in equity?*) If a man be dispossessed of his lands, and his son release to the person in possession all the right which he has or may have, will this prevent him, on his father's death, from recovering the lands? Would this release be now effectual under the 8 & 9 Vict. c. 106, s. 6? Has a feoffment any tortious operation? When the period fixed by the Statute of Limitations for recovering lands has expired, what is the effect? What provisions have been made, and by what statute, for making valid the disposition of future interests and possibilities, coupled with an interest in lands? Does the statute extend to any, and what, rights of entry? (*See Note to Sect. 347, and what is said in the questions thereon, ante, p. 144.*) Can a bare possibility or hope of succession be disposed of?

CCCCXLVII. [p. 85.]—To whom must a release of a bare right to land be made? Is not a release by way of enlargement to a lessee for years good?

CCCCXLVIII. [p. 85.]—What is a freehold in law? Hath the heir the freehold cast on him? Is a release to him before entry good, and is his wife thereof dowable? Is a husband

entitled to curtesy of a seisin in law? Is a wife entitled to dower, though her husband was entitled to a right of entry only?

CCCCXLIX. & CCCCLII. [p. 86.]—Is a release good in some cases, though the releesee hath no freehold? Is a release to a reversioner good? Must the reversioner be able to make profert of the deed? Is profert now abolished?

CCCCLIII. [p. 87.]—Will a release to tenant for life avail the reversioner or remainder-man?

CCCCLIX. [p. 87.]—Will a release to a lessee before entry be good? In what cases is a lessee's entry necessary? Suppose entry should still be considered necessary to enable a lessee to receive a release, would not the release have some, and what, operation?

CCCCLX. [p. 87.]—Is a release to a tenant at will good? Has the lessor a reversion? Could he grant the estate as a reversion? (*If he did, would it not pass all his estate?*)

CCCCLXI. [p. 88.]—Is a release to a tenant at sufferance good? (*Would it not operate as a grant?*) What is a tenancy at sufferance?

CCCCLXV. [p. 88.]—Should releases by way of enlargement (Sect. 468) have limitations of the estate? Release by lessor seised in fee to his lessee for years of all his right: what estate passes? Lease to one for life by the owner seised in fee, who afterwards releases all his right to the lessee: is the estate of the latter enlarged? Will a fee pass by a release from one joint tenant in fee to his companion without the words "his heirs?"

CCCCLXVI. [p. 89.]—Do some, and what, releases operate *de mitter le droit*? To whom may such releases be made? Is any privity necessary to such releases? (*The reader, in order to make this section and the others which treat of disseisin, disseisors, and disseisees, more evident and applicable to the present state of the law, should remember that the keeping out of possession a rightful owner is the same as a disseisin, and the person who keeps the possession is as a disseisor, and he who is kept out of possession as a disseisee. When, indeed, the Statute of Limitations has fully run, the party in possession has then a rightful title, and is no longer in the position of a disseisor. See Note to Sect. 446, p. 86.*)

CCCCLXVII. [p. 89.]—On a release of right to one seised in fee, need the heirs be mentioned?

CCCCLXVIII. [p. 89.]—Must a release by way of enlargement (Sect. 465) express the estate to be taken by the releesee? (*See also latter part of Sect. 469.*)

CCCCLXIX. [p. 89.]—Must a release of a right (*Sect. 466*) make mention of the heirs of the lessee?

CCCCLXXIX. [p. 90.]—What are releases which enure by way of extinguishment?

CCCCLXXX. [p. 90.]—What kind of release is a release of a rent-charge or common of pasture?

CCCCXCVII. & CCCCXCVIII. [p. 90.]—Release of actions personal to one who hath my goods: may I afterwards take my goods?

DIV. & DV. [p. 91.]—Does a release of actions extend to executions? Would a release of *suits*? How should executions be released?

DVIII. [p. 91.]—Is a release of *demands* the best release? What is thereby released? Will it discharge an unbroken covenant for an unliquidated demand? Will a general release of a debt extend to a reversion?

DIX. [p. 91.]—Does a release of demands take away a right of entry into lands? Could the lands formerly be recovered notwithstanding such release, and how is it now?

DX. [p. 92.]—Will a release of demands extinguish a rent-service, or rent-charge, or common of pasture, &c.? What kind of rent-service would be extinguished?

DXII. [p. 92.]—Obligor releases all actions to the obligee of a bond for payment of a certain sum before the day: can he sue on the bond? Would such a release discharge a covenant for an unliquidated demand? (*See also Sect. 508.*)

DXIII. [p. 92.]—Would a release of all actions to a lessee discharge future rent? Is a rent a mere chose in action?

CONFIRMATION. [pp. 93—98.]

[Form of Deed—Better than Release—Joint Tenants (p. 93)—Of Estate of Lessee—To Husband and Wife (p. 94)—Charge by Parson (p. 95)—By Enlargement—Abridging Services (p. 96)—Extinguishment—Releases to Tenants (p. 97)—Rent-charge (p. 98).]

DXV. [p. 93.]—What is the form of a deed of confirmation?

DXVI. [p. 93.]—Is a confirmation available in some, and what, cases where a release would not be? Lessee for life leases to another for forty years; reversioner in fee confirms such lease, and then tenant for life dies: is the lease for years good as against the reversioner in fee?

DXVII. [p. 93.]—Is a release to a tenant valid without privity? If, in the case in the preceding section, it had been a release instead of a confirmation, would it have been valid? If not as a release, yet as a grant?

DXXIII. [p. 93.]—If one joint tenant confirm the estate of the other, what is the effect? What if there be an *habendum* to the confirmee and his heirs? Can joint tenants grant to each other?

DXXIV. [p. 94.]—Confirmation by lessor to lessee for life of his estate, to hold the estate to lessee and his heirs: what estate has he? Suppose it were to hold the same land to the lessee and his heirs; would it make any, and what, difference? What is the distinction between these cases?

DXXV. [p. 94.]—A female lessee for *life* marries, and the reversioner confirms the estate of the husband and wife *habendum* for term of their two lives: what is the effect?

DXXVI. [p. 94.]—A female lessee for *years* marries, and the reversioner confirms the estate of the husband and wife, to hold the land for term of their two lives: what estate have they? (*Note the difference; in the former case the wife was lessee for LIFE; in the latter for years; besides in the latter the habendum was of the LAND.*)

DXXVIII. [p. 95.]—Can a parson charge his glebe with the consent of any other, and what, parties? Are charges of a benefice valid? Is a demise of a benefice for securing an annuity valid? If a clergyman give a warrant of attorney to enter up judgment, is it valid in any, and what, case?

DXXIX. [p. 95.]—If tenant for life grant a rent-charge in fee, and the reversioner confirms it, will it be effectual?

DXXXII. & DXXXIII. [p. 96.]—If a lessor make a deed to his lessee for years, reciting that he has granted the land to him to hold for life, &c., what estate has such lessee? Can an estate tail be enlarged to a fee simple? Can the reversion in fee expectant on the estate tail be granted to tenant in tail? Would his estate tail merge?

DXXXVI. & DXXXVII. [p. 96.]—If one have a rent-charge out of common of pasture in lands, and he confirm the estate of the tenant, is the rent-charge or common affected?

DXXXVIII. & DXXX. [p. 96.]—Can a confirmation abridge the services? Can there be a reservation of new services thereon?

DXLIII. & DXLIV. [p. 97.]—If a lessor grant to his lessee and his heirs the rent, what will be the effect? If a grantee of a rent-charge make such a grant, what will be the effect?

DXLV. & DXLVI. [p. 97.]—By confirmation to lessee for

years of his estate, what passes? If the lessor release to such lessee all his right in the land, what passes?

DXLVII. [p. 97.]—Is a release by the reversioner to an underlessee good? Would a confirmation be good? Would not the release be supported as a grant?

DXLVIII. [p. 98.]—Grant of a rent-charge for life; confirmation thereof *habendum* to grantee in tail or in fee: is the estate enlarged? (*What objection occurs to you against holding the confirmation to be a grant?*)

DXLIX. [p. 98.]—If one seised in fee of a rent-service or rent-charge grant the same to another for life, and after confirm the estate of the grantee in tail or in fee, is this good?

DL. [p. 98.]—In the case put in Sect. 548, what should be done to effect the object of the parties?

ATTORNMEN. [pp. 98—102.]

[Definition (p. 98)—Rent passes with Reversion (p. 100)—Profert—Release by Joint Tenant (p. 101)—Devisee of Rent-charge (p. 101)—Devise of Reversion (p. 102).]

DLI. [p. 98.]—What was attornment? How was it formerly avoided? What statutes have rendered it, in general, unnecessary? What attornments are now made? Where a rent was granted prior to the statutes, must attornment be now alleged?

DLIX. [p. 100.]—If the lord grant in fee to the wife of his tenant the services, what will be the effect during the coverture and after it has ceased?

DLXXII. [p. 100.]—If a lessor grant his reversion, does the rent also pass? Is rent incident to the reversion? Can the rent be granted, reserving the reversion? (*This shows, as stated in Note to Sect. 513, p. 92, that a rent is not merely a thing in action; for if it were, it could not be granted over at law.*)

DLXXIII. [p. 100.]—On a confirmation to a lessee for life, the remainder over in fee, is the remainder in the party, and can he sue for waste. Must he make profert of the deed. Is profert now necessary in any case? What is the remedy for waste? Who could formerly, and can now, maintain the action?

DLXXIV. [p. 101.]—Two joint tenants lease for life, rendering to them and their heirs a rent: if one joint tenant release to the other, what will be the effect?

DLXXV. [p. 101.]—Lease to A for life, remainder to B

for life; the reversioner releases to B and his heirs all his right; what is the effect?

DLXXXV. [p. 101.]—One entitled to a rent-service or a rent-charge devises same; can the devisee distrain for same?

DLXXXVI. [p. 102.]—Lessor devises his reversion in fee, can the devisee distrain for the rent and bring an action for waste? Devise to one to hold for ever; what estate passes? Conveyance to one to hold for ever; what estate passes?

DISCONTINUANCE. [pp. 102—114.]

[Definition—By Husband (pp. 103, 109)—By Tenant in tail —Leases by Tenants in tail (pp. 104, 105)—Conveyances by Tenants in tail (pp. 104, 108)—Advowsons (p. 107)—Heirs Male (p. 108)—Devise by Tenant in tail (p. 108)—Infant (p. 109)—Parson (pp. 110—112)—Abeyance (p. 111)—Dean and Chapter (p. 113).]

DXCII. [p. 102.]—What was meant by a discontinuance? Who could effect a discontinuance? What conveyances produced a discontinuance? Has a feoffment a tortious operation now? Are warranties of lands void against issue in tail and persons claiming after the determination thereof? What was the effect of a discontinuance? If tenant in tail levied a fine, what effect had that? Would a discontinuance, prior to the 8 & 9 Vict. c. 106, and since the 3 & 4 Will. 4, c. 27, have taken away a right to make an entry?

DXCIV. [p. 103.]—If a husband seised in right of his wife made a feoffment and died, could the wife enter?

DXCV. [p. 103.]—If tenant in tail enfeoffed another in fee, could the issue have entered, or were they put to their action? What powers of alienation have tenants in tail now? Whose consent must tenant in tail under a settlement obtain in order to pass an absolute fee? What will pass without such consent? By what instrument must the disposition be made? Must it be enrolled?

DXCIX. [p. 104.]—What passes now by a feoffment?

DC. & DCVI. [p. 104.]—What passed by the release of a tenant in tail? What leases of a tenant in tail are now valid? What by the 32 Hen. 8, c. 28?

DCVII. [p. 105.]—Confirmation by tenant in tail to lessee for years, to hold to him and his heirs; what estate passed?

DCXII. [p. 105.]—Lease for life of tenant in tail, with release to lessee and his heirs of all his right; what passed, in

Littleton's opinion, and what according to the better opinion? (*The note to this section affects several other of the sections, and should, therefore, be well understood.*) When a tenant in tail leases for his own life, is there any and what reversion in him? Can he grant this reversion? How does the release operate? Had tenant in tail any reversion after such release? What estate did the relessee take? Was his wife dowable there-out?

DCXIII. [p. 106.]—Grant by tenant in tail of his estate to hold in fee, what estate has the grantee? What power of alienation has a tenant in tail now?

DCXV. [p. 107.]—Was grant in fee by tenant in tail in remainder a discontinuance? And why not?

DCXVII. [p. 107.]—Grant in fee by tenant in tail of an advowson or common in gross; was this a discontinuance?

DCXVIII. [p. 107.]—Could things lying in grant be discontinued? If a fine were levied, would it have made any difference?

DCXIX. [p. 107.]—Lease by tenant in tail for years, and grant of remainder to another in fee; the term expires in the lifetime of the tenant in tail; the remainder-man enters and then tenant in tail dies leaving issue: was this a discontinuance?

DCXXIII. [p. 108.]—Gift in tail male; the donee has two sons, the elder of whom has a daughter and dies; the tenant in tail leases for years and dies; to whom will the reversion descend? If the lease had been for *life*, would it have made any and what difference? And what is now the law?

DCXXIV. [p. 108.]—Was a devise by tenant in tail a discontinuance? Can tenants in tail, in general, devise their lands? How can they acquire a testamentary power?

DCXXV. [p. 108.]—Could there be a discontinuance without the reversion being affected?

DCXXVI. [p. 109.]—Feoffment by tenant in tail to remainder-man in fee; was it a discontinuance?

DCXXXIII. [p. 109.]—If an infant husband conveyed his wife's estate in fee could the wife, after his death, enter? (*See also Sect. 594 and note.*) Is a feoffment by an infant void? Is there any and what exception?

DCXXXVII. [p. 110.]—By whom could an estate tail be discontinued?

DCXLIII.—DCXLVI. [p. 110.]—If a parson alien, can his successor enter? What leases may a parson make? Whose consent is required?

DCXLVII. & DCXLVIII. [p. 111.]—When a parson dies is the freehold in abeyance? Has the parson the fee simple?

Can the parson, with any and what consent, charge the glebe with a rent?

DCL. [p. 112.].—Where tenant in tail grants all his estate, what estate has the grantee? What was Littleton's opinion? What now passes by such a conveyance?

DCLVI. [p. 113.].—Can a Dean and Chapter sue separately? When should they so sue and be sued, and when jointly? Is a Dean alone a corporation?

DCLVIII. [p. 113.].—Was a feoffment by tenant in tail in remainder a discontinuance? Would the existence of a mere term for years prior to the estate tail prevent the tenant in tail from making a discontinuance? (*Does not this show that for some purposes the law does not consider a tenancy for years as an estate?*)

REMITTER. [pp. 114—120.]

[Definition (p. 114).—Husband aliening Wife's Lands (p. 115).—Estoppel—Fine by Married Women (p. 116).—Entireties (p. 117).—Dower of Freehold in Law (p. 118).—Estoppel (p. 119).—Disclaimer (p. 119).]

DCLIX. [p. 114.].—What is remitter? Tenant in tail discontinued the entail and then disseised the discontinuee and died; if his issue enter are they remitted to the entail? How could the donee's *cousin* be inheritable to the entail? (*See Note to Sect. 242, p. 46.*) Is there a remitter where the party comes to the estate by his own act or assent? (*The case of Daniell v. Woodroffe must be considered to furnish the correct answer.*) Is there a remitter where the land is not recoverable by action or entry? To what estates does the doctrine of remitter apply? Has the Statute of Uses affected remitters? Is a person entering under a deed operating under the Statute of Uses capable of being remitted?

DCLXVI. & DCLXVII. [pp. 115, 116.].—Husband aliens in fee his wife's lands; the alienee lets the same lands to the husband and wife for their two lives; is the wife remitted, and what estate has she? Would the husband be liable for waste to the lessor?

DCLXI. [p. 116.].—What is the reason of the allowance of a remitter?

DCLXIV. [p. 116.].—If tenant in tail enfeoffed his heir, being of full age, was such heir remitted on his father's death? (*See the case of Daniell v. Woodroffe, mentioned in note to Sect.*

659, p. 115, as to a man's being remitted *nolens volens*, and though he is a consenting party to the deed.)

DCLXX. [pp. 116, 117.]—Must a married woman have been examined before levying a fine? Was she and her heirs bound, though not examined? Have fines been abolished by any and what statute? How may a married woman dispose of her lands, or of money to be laid out in lands? Is the husband's concurrence necessary? Must the deed be acknowledged? Must she be separately examined?

DCLXXII. [p. 117.]—Gift to husband and wife in special tail; the husband aliens in fee, and afterwards takes back an estate to him and his wife for their lives; is this a remitter, and to whom? On a gift to husband and wife for their lives, and the life of the longer liver of them, what estate would their conveyance, in general terms, pass?

DCLXXX. [p. 118.]—If husband discontinued his wife's estate, and took back an estate to him for life, the remainder to his wife; was there a remitter to the wife, and when?

DCLXXXI. [p. 118.]—Who is tenant of freehold in law, and who of freehold in deed? Is a wife dowable of a freehold in law?

DCXCIII. [p. 119.]—Where a person dispossessed takes an estate from the person dispossessing him, is there a remitter under all, or only some, and what circumstances? Is a deed-poll an estoppel? Will it estop a lessee, &c.?

DCXCV. [p. 119.]—If a person be dispossessed, and the dispossessor let the land to him, without indenture, for years: is this a remitter on entry under the lease? Suppose, on his entry, he orally disclaimed any other estate than under the lease: would that make a difference? Does a tenant for years forfeit his term by orally disclaiming? Is the intention with which a party enters into lands important in reference to the doctrine of disclaimer?

WARRANTY. [pp. 120—123.]

[Definition (p. 120)—Doweress (p. 121)—Borough-English (p. 121)—Gavelkind (p. 122)—Corruption of Blood, Inheritance (p. 122).]

DCXCVII. [p. 120.]—How many kinds of warranty were there? What warranties were bars to the heirs? What was the effect of lineal, and what of collateral, warranty? What warranties were avoided by the 4 & 5 Anne, c. 16? What was necessary to make lineal warranty binding? Have war-

ranties been rendered of no effect? Will they defeat any right of entry?

DCCXXVII. [p. 121.]—If doweress aliened her dower lands, or any given her in tail by her husband or her relations, with warranty, was it effectual? Is the Act relating thereto repealed entirely?

DCCXXXV. & DCCXXXVI. [pp. 121, 122.]—Did the warranty follow the descent by custom, as in Borough-English and gavelkind lands?

DCCXLVII. [p. 122.]—What was the effect of an attainder for felony? Can the wife of a traitor be endowed? Can the wife of a man convicted of any felony (other than treason) be endowed? (*Yes; the law is altered since Littleton's time. See 3 Prest. Abstr. 385; Noy's Dial. p. 39; Co. Litt. 41 a, n. 5; Com. Dig. tit. "Dower," F. 1.*) Is the issue in tail barred by the attainder of the donee? What provision is made by the 54 Geo. 4, c. 145, as to the right to inherit lands where a person entitled has been attainted for felony, except treason or murder? What by the 3 & 4 Will. 4, c. 106? Must the attainted person have died before the descent so as to be within the statute?

END OF VOL. I.

ERRATA.

P. 18, l. 7 from bottom, for "that a case containing," read "that a lease containing."

P. 51, l. 2 from bottom, for "a writ of partition lieth," read "a writ of partition formerly lay."

P. 96, l. 9 from top, for "fee fail," read "fee tail."



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